

No. 14926

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United States  
Court of Appeals  
for the Ninth Circuit

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PACIFIC FREIGHT LINES and SIDNEY S.  
RUSSELL, Appellants,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Southern  
District of California, Central Division

FILED

APR 19 1956

PAUL P. O'BRIEN, CLERK



No. 14926

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Court of Appeals  
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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint .....	8
Appeal:	
Certificate of Clerk to Transcript of Record	
on .....	22
Notice of .....	22
Statement of Points on .....	123
Certificate of Clerk to Transcript of Record...	22
Complaint .....	3
Findings of Fact and Conclusions of Law....	13
Judgment .....	20
Memorandum of Points and Authorities in Sup- port of Motion for Separate Trial.....	12
Minute Order, Feb. 28, 1955, Denying Motion for Separate Trial .....	12
Motion for Separate Trial .....	11
Names and Addresses of Attorneys.....	1
Notice of Appeal .....	22

Notice of Motion for Separate Trial.....	10
Opinion, Oral .....	100
Order Denying Motion for Separate Trial (M.O. Feb. 28, 1955) .....	12
Statement of Points on Appeal (USCA).....	123
Transcript of Proceedings and Testimony (Partial) .....	24
Exhibit A for Defendants—Copy of Vehicle Equipment Operational Record .....	56
Opinion, Oral .....	100
Witnesses:	
Haag, George	
—direct (Calabro) .....	27
Harding, Thomas H.	
—direct (Mullender) .....	94
Partch, David D.	
—direct (Mullender) .....	59
—cross (Wheeler) .....	60
Phelps, Eugene A.	
—direct (Mullender) .....	66
—cross (Wheeler) .....	84, 93
—cross (Calabro) .....	85
Russell, Sidney Springer	
—direct (Calabro) .....	25
—cross (Mullender) .....	25
Schuermann, Norbert J.	
—direct (Mullender) .....	29

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Smith, Clarence C.

—direct (Mullender) ..... 62

Snyder, Bernard R.

—direct (Mullender) ..... 34

—cross (Calabro) ..... 39

—redirect (Mullender) ..... 49, 54

—recross (Calabro) ..... 53



## NAMES AND ADDRESSES OF ATTORNEYS

### Attorneys for Appellant:

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Los Angeles 5, California,

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505 Chancery Building,  
564 Market Street,  
San Francisco 4, California.

### Attorneys for Appellee:

LAUGHLIN E. WATERS,  
United States Attorney,  
MAX F. DEUTZ,  
JOSEPH D. MULLENDER, JR.,  
Assistants United States Attorney,  
600 Federal Building,  
Los Angeles 12, California.



In the District Court of the United States, South-  
ern District of California, Central Division

Civil Action No. 17356-Y.

PACIFIC FREIGHT LINES and SIDNEY S.  
RUSSELL, Plaintiffs,  
vs.

EUGENE A. PHELPS, UNITED STATES OF  
AMERICA, Defendants.

COMPLAINT FOR PROPERTY DAMAGE  
AND FOR PERSONAL INJURIES

Comes Now the plaintiff Pacific Freight Lines  
and complains of the defendants and alleges:

I.

This action is pursuant to authority of Section  
1346(b), Title 28, U. S. Code, commonly known as  
the Federal Tort Claims Act.

II.

That at all times herein mentioned, the plaintiff  
Pacific Freight Lines was and still is a corporation  
duly authorized to do and doing business in the  
State of California.

III.

That at all times material herein, the plaintiff  
Pacific Freight Lines was the owner of a certain  
Sterling tank truck.

IV.

That the collision hereinafter referred to, oc-

curred on U. S. Highway 66, at a point approximately 10 miles west of the City of Barstow, County of San Bernardino, State of California, and that said collision occurred within the judicial district and division of this Honorable Court.

## V.

That at all times herein material, the defendant Eugene A. Phelps was a member of the United States Air Force, and at all times herein mentioned, defendant Eugene A. Phelps was acting in the course and scope of his office as a member of the United States Air Force.

## VI.

That at all times material herein, the United States Air Force was the owner of a certain 1951 Chevrolet automobile, which at all times herein mentioned was being operated by the defendant Eugene A. Phelps with the permission and consent of said owner.

## VII.

That on or about the 5th day of February, 1954, on United States Highway 66, at a point approximately 10 miles west of the City of Barstow, County of San Bernardino, State of California, the defendant Eugene A. Phelps so negligently and carelessly maintained, operated, drove and controlled said 1951 Chevrolet automobile as to directly and proximately cause the same to run into and collide with said Sterling tank truck.

## VIII.

That as a direct and proximate result of the negligence and carelessness of the defendants as aforesaid, the Sterling tank truck of the plaintiff was wrecked, damaged and depreciated so that the reasonable and necessary cost of towing and repairing the same was the sum of \$2,433.51, all to the damage of said plaintiff in a like amount.

## IX.

That as a further direct and proximate result of the aforesaid carelessness, recklessness and negligence of the defendants and each of them and of said collision as aforesaid, plaintiff was deprived of the use of said Sterling tank truck for a period of twenty-seven (27) days, which is and was a reasonable period required to effect the necessary repairs to said Sterling tank truck; that by reason of the deprivation of the use of said Sterling tank truck as aforesaid, the plaintiff lost certain profits which thereby might have accrued to plaintiff; that the reasonable value of the use of said Sterling tank truck was and is the sum of \$57.60 per day; that the loss of profits accruing to plaintiff as aforesaid was and is the sum of \$57.60 per day; that by reason of the deprivation of the use of said Sterling tank truck as aforesaid and the loss of profits which thereby might have accrued to plaintiff, plaintiff has been further damaged in the sum of \$1,555.20.

Plaintiff Sidney S. Russell complains of the defendants and for cause of action alleges:

### I.

Plaintiff repeats, repleads and realleges each and every allegation contained in Paragraphs I, IV, V, VI and VII of the foregoing cause of action and by reference thereto incorporates the same herein as though fully set forth anew.

### II.

That at all times herein material, the plaintiff was driving a certain Sterling tank truck.

### III.

That as a direct and proximate result of the carelessness and negligence of the defendants as aforesaid, the plaintiff has suffered and will in the future continue to suffer painful and severe injuries and was made sick, sore and lame and was injured in and about the head and face; as a further direct and proximate result of said negligence and carelessness, said plaintiff was caused to suffer and did suffer and will continue to suffer great mental, physical pain and anguish and by reason thereof plaintiff has been damaged in the sum of \$15,000.00.

### IV.

That as a further direct and proximate result of the negligence and carelessness of the defendants as aforesaid, said plaintiff has incurred obligations in the sum of \$168.66, for the care, cure and treatment of said injuries, which sum is a reasonable and proper amount therefor, all to the plaintiff's damage in a like amount; that plaintiff is informed and believes and therefore alleges that plaintiff will con-

tinue to incur obligations for the care and cure of said injuries, suffering and pain and that plaintiff is unable to determine the amount of expense or obligations hereafter to be so incurred and therefore respectfully requests leave of court to amend this complaint by proper amendment when the sum has been ascertained.

### V.

That as a further direct and proximate result of the carelessness and negligence of the defendants as aforesaid, the plaintiff was unable to engage in any employment for a period of ten (10) days, all to the plaintiff's further damage in the sum of \$250.00.

Wherefore, plaintiff Pacific Freight Lines prays judgment as follows:

1. For property damage in the sum of \$2,433.51;
2. For loss of use in the sum of \$1,555.20;
3. For costs of suit and such other relief as the court may deem just and proper in the premises.

And Plaintiff Sidney S. Russell prays judgment as follows:

1. For pain and suffering the sum of \$15,000.00;
2. For medical expenses heretofore incurred in the sum of \$168.66;
3. For future medical expenses which plaintiff might incur; and
4. For loss of earnings in the sum of \$250.00;
5. For costs of suit and for such other and further relief as to the court may seem just and proper in the premises.

ROBERT W. STEVENSON and  
ANTHONY J. CALABRO,  
/s/ By ANTHONY J. CALABRO,  
Attorneys for Plaintiffs

Duly Verified.

[Endorsed]: Filed October 19, 1954.

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[Title of District Court and Cause.]

### ANSWER

For Answer to the claim of plaintiff Pacific Freight Lines defendant United States of America, in its own behalf only:

#### I.

Admits the allegations contained in paragraphs I, II, III and IV of this claim for relief.

#### II.

Admits "that at all times here material, defendant Eugene A. Phelps was a member of the United States Air Force", as alleged in paragraph V of this claim for relief but denies upon information and belief "that at all times herein mentioned, defendant Eugene A. Phelps was acting in the course and scope of his office as a member of the United States Air Force" as is also alleged in paragraph V of this claim for relief.

#### III.

Admits "that at all times material herein, the United States Air Force was the owner of a certain

1951 Chevrolet automobile which at all times herein mentioned was being operated by the defendant Eugene A. Phelps" as alleged in paragraph VI of this claim for relief but denies that said operation was at all times "with the permission and consent of said owner" as is also alleged in paragraph VI of this claim for relief.

#### IV.

Upon information and belief denies the allegations contained in paragraphs VII, VIII and IX of that claim for relief.

For Answer to the claim of plaintiff Sidney S. Russell defendant United States of America, in its own behalf only:

#### I.

Adopts as its Answer to paragraph I of the claim for relief of Sidney S. Russell the allegations of its Answer to paragraphs I, IV, V, VI and VII of the claim of plaintiff Pacific Freight Lines.

#### II.

Admits the allegations contained in paragraph II of this claim for relief.

#### III.

Upon information and belief denies the allegations contained in paragraphs III, IV and V of this claim for relief.

LAUGHLIN E. WATERS,  
United States Attorney

MAX F. DEUTZ,  
Assistant U. S. Attorney, Chief,  
Civil Division

/s/ MARVIN ZINMAN,  
Assistant U. S. Attorney,  
Attorneys for Defendant, United  
States of America

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1955.

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[Title of District Court and Cause.]

Notice of Motion for Separate Trial; Motion for Separate Trial; Memorandum of Points and Authorities in Support of Motion for Separate Trial.

**NOTICE OF MOTION FOR SEPARATE TRIAL**

Please Take Notice that the undersigned will move this Court in the courtroom of the Honorable Leon Yankwich, United States Courthouse and Post Office Building, City of Los Angeles, State of California, on the 28th day of February, 1955, at 10:00 a.m. in the morning of that day, or as soon thereafter as counsel can be heard, for an order that a separate trial may be had as between the defendant, United States of America, and the plaintiffs in this action on the issue of scope of employment.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief,  
Civil Division

/s/ MARVIN ZINMAN,

Assistant U. S. Attorney

**MOTION FOR SEPARATE TRIAL**

Defendant, United States of America, moves the Court to order that the trial date for this action previously assigned, April 12, 1955, be vacated and that pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, that the Court order that a separate trial be had in this case as to the issue of scope of employment. The ground upon which this Motion is based is that a trial of this issue alone will be of convenience to the moving defendant.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,

/s/ MARVIN ZINMAN,

Assistant U. S. Attorney,

Attorneys for Defendant United  
States of America

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SEPARATE TRIAL

An Order for a separate trial of a separate issue may be had where convenience will result.

Rule 42(b) of the Federal Rules of Civil Procedure.

LAUGHLIN E. WATERS,  
United States Attorney,

MAX F. DEUTZ,  
Assistant U. S. Attorney, Chief,  
Civil Division

/s/ MARVIN ZINMAN,  
Assistant U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 15, 1955.

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[Title of District Court and Cause.]

## MINUTES OF THE COURT

Date: Feb. 28, 1955, at Los Angeles, Calif.

Present: Hon. Leon A. Yankwich, District Judge;  
Deputy Clerk: John A. Childress; Reporter: Marie  
Zellner; Counsel for Plaintiffs: Anthony J. Calabro;  
Counsel for Defendants: Marvin Zinman, Ass't U.  
S. Att'y.

Proceedings: For hearing motion of U.S.A., filed

Feb. 15, 1955, for separate trial on issue of scope of employment.

Attorney Zinman argues in support of motion.

Court Orders said motion denied.

EDMUND L. SMITH,  
Clerk

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled case having come on regularly for trial on April 12, 1954, before the Honorable Leon R. Yankwich, Judge presiding;

The plaintiffs having appeared by their attorneys, Robert W. Stevenson and Anthony J. Calabro;

The defendant, United States of America, having appeared by its attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Chief of Civil Division, and Joseph D. Mullender, Jr., Assistant United States Attorney;

The defendant, Eugene A. Phelps, having appeared by his attorney, Donald Wheeler;

The Court having considered all of the pleadings filed herein, the evidence offered by the parties at the time of trial, and the arguments of counsel;

And the Court being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

### Findings of Fact

#### I.

On February 4, 1954, the defendant, Eugene A. Phelps, was an Airman in the United States Air Force, stationed at George Air Force Base, Victorville, California, and was employed as a driver in the motor pool at said Air Force Base.

#### II.

On said date at approximately 3:00 o'clock p.m., the United States Air Force dispatched to defendant Eugene A. Phelps, a 1951 Chevrolet automobile, owned by the defendant, United States of America, and ordered him to drive an Air Force officer, Lt. Col. Philip E. Joyal, from George Air Force Base to the International Airport in Los Angeles, California, and to return immediately to George Air Force Base after the officer had been delivered to said Airport.

#### III.

Los Angeles, California is located at a point which is approximately 115 miles west of George Air Force Base.

#### IV.

After beginning the trip to Los Angeles, California, Lt. Col. Joyal ordered the defendant, Eugene A. Phelps, to deliver him to the Biltmore

Hotel in Los Angeles instead of taking him to Los Angeles International Airport.

## V.

On said date of February 4, 1954, at approximately 6:00 o'clock p.m., the defendant, Eugene A. Phelps, delivered Lt. Col. Joyall to the Biltmore Hotel, and began making the return trip in a general easterly direction toward George Air Force Base.

## VI.

On said date at approximately 7:00 o'clock p.m., the defendant, Eugene A. Phelps, stopped in Pasadena, California, and had dinner, after which he again continued on the return trip in a general easterly direction toward George Air Force Base.

## VII.

On said date at approximately 9:00 o'clock p.m., the defendant, Eugene A. Phelps, stopped again in a cafe in San Bernardino, California, where he remained until approximately 12:00 o'clock midnight.

## VIII.

On said date at approximately 12:00 o'clock midnight, defendant, Eugene A. Phelps, again continued on the return trip in a general easterly direction toward George Air Force Base.

## IX.

When the defendant, Eugene A. Phelps, arrived

at the junction of United States Highways 395 and 66, he stopped and picked up a hitchhiker.

## X.

After picking up the hitchhiker, the defendant, Eugene A. Phelps, asked him to drive the car, and the hitchhiker drove the car in a general easterly direction on United States Highway 66.

## XI.

After the hitchhiker began to drive, the defendant, Eugene A. Phelps, went to sleep.

## XII.

When the defendant, Eugene A. Phelps, awoke, it was 5:00 o'clock a.m., February 5, 1954, and he and the car were in Barstow, California.

## XIII.

Barstow, California is located on United States Highway 66, approximately 35 miles east of the point where the road to George Air Force Base intersects United States Highway 66.

## XIV.

Upon waking up at Barstow, California, the defendant, Eugene A. Phelps, began driving the car in a general westerly direction on United States Highway 66.

## XV.

At approximately 5:15 o'clock a.m., on February 5, 1954, the defendant, Eugene A. Phelps, was driv-

ing in a general westerly direction on United States Highway 66 and was at a point approximately ten miles west of Barstow, California, and 25 miles east of the point on United States Highway 66, where said Highway is intersected by the road to George Air Force Base.

### XVI.

At said time and place, a Sterling tank truck, owned by the plaintiff, Pacific Freight Lines, and operated by the plaintiff, Sidney S. Russell, was proceeding in a general easterly direction on United States Highway 66, and approaching the 1951 Chevrolet automobile, owned by the defendant, United States of America, and operated by the defendant Eugene A. Phelps.

### XVII.

At said time and place the defendant, Eugene A. Phelps, negligently operated the 1951 Chevrolet automobile and caused it to cross over the center line of the Highway and to collide with the Sterling tank truck on the south side of the highway.

### XVIII.

As a direct and proximate result of the collision and of the negligence of the defendant, Eugene A. Phelps, the Sterling tank truck was damaged, and the plaintiff, Sidney S. Russell, suffered personal injuries.

### XIX.

The reasonable and necessary cost of repairing

the damage caused to the Sterling tank truck was \$2,433.51.

## XX.

The reasonable and necessary cost of transferring the load in the tank truck to another truck and of supervising the transfer was \$275.36.

## XXI.

The reasonable rental value of the tank truck for the time necessary to repair it was \$1,555.20.

## XXII.

The reasonable and necessary medical expenses incurred by the plaintiff, Sidney S. Russell, by reason of the personal injuries caused by the collision were \$168.66.

## XXIII.

The plaintiff, Sidney S. Russell, suffered general damages from pain and suffering caused by the collision in the sum of \$1,500.00.

## XXIV.

The defendant, Eugene A. Phelps, was not acting within the scope of his office or employment at the time of the collision.

### Conclusions of Law

#### I.

The plaintiff, Pacific Freight Lines, is entitled to a judgment against the defendant, Eugene A. Phelps, in the total sum of \$4,264.07, and for its costs of suit.

II.

The plaintiff, Sidney S. Russell, is entitled to a judgment against the defendant, Eugene A. Phelps, in the total sum of \$1,668.66, and for his costs of suit.

III.

The defendant, United States of America, is entitled to a judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

Dated this 4th day of May, 1955.

/s/ LEON R. YANKWICH,  
United States District Judge

Submitted by:

/s/ Joseph D. Mullender, Jr.,  
Assistant U. S. Attorney, Attorney for De-  
fendant, United States of America.

Approved as to Form this 23rd day of April, 1955:

/s/ Anthony J. Calabro,  
Attorney for Plaintiffs, Pacific Freight  
Lines and Sidney S. Russell.

Approved as to Form this 29 day of April, 1955:

/s/ Donald E. Wheeler,  
Attorney for Defendant, Eugene A. Phelps.

[Endorsed]: Filed May 4, 1955.

In the United States District Court for the Southern District of California, Central Division

Civil No. 17356-Y.

PACIFIC FREIGHT LINES and SIDNEY S.  
RUSSELL, Plaintiffs,  
vs.

EUGENE A. PHELPS, UNITED STATES OF  
AMERICA, Defendants.

### JUDGMENT

The above-entitled case having come on regularly for trial on April 12, 1954, before the Honorable Leon R. Yankwich, Judge presiding;

The plaintiffs having appeared by their attorneys, Robert W. Stevenson and Anthony J. Calabro;

The defendant, United States of America, having appeared by its attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Chief of Civil Division, and Joseph D. Mullender, Jr., Assistant United States Attorney;

The defendant, Eugene A. Phelps, having appeared by his attorney, Donald Wheeler;

The Court having considered all of the pleadings filed herein, the evidence offered by the parties at the time of trial, and the arguments of counsel;

And the Court being fully advised in the premises, and having made written Findings of Fact and Conclusions of Law:

It is hereby ordered, adjudged and decreed:

That the plaintiff, Pacific Freight Lines, do have and recover of and from the defendant, Eugene A. Phelps, the total sum of \$4,264.07, plus its costs of suit.

That the plaintiff, Sidney S. Russell, do have and recover of and from the defendant, Eugene A. Phelps, the total sum of \$1,668.66, plus his costs of suit.

That the defendant, United States of America, have judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

Dated this 4th day of May, 1955.

/s/ LEON R. YANKWICH,  
United States District Judge

Submitted by:

/s/ Joseph D. Mullender, Jr.,  
Assistant U. S. Attorney, Attorney for De-  
fendant, United States of America

Approved as to Form this 23rd day of April, 1955:

/s/ Anthony J. Calabro,  
Attorney for Plaintiffs, Pacific Freight  
Lines and Sidney S. Russell

Approved as to Form this 29 day of April, 1955:

/s/ Donald E. Wheeler,  
Attorney for Defendant Eugene A. Phelps.

[Endorsed]: Filed May 4, 1955. Entered May 6,  
1955.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given this 25th day of May, 1955 that Pacific Freight Lines and Sidney S. Russell, plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of this Court entered on the 6th day of May, 1955, in favor of the defendant United States of America and against said plaintiffs.

Dated: May 25, 1955.

ROBERT W. STEVENSON and  
ANTHONY J. CALABRO,

/s/ By GEORGE W. KELL,

Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1955.

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[Title of District and Cause.]

### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 31, inclusive, contain the original

Complaint;

Answer;

Motion and Notice of Motion and Memo of Points and Authorities in Support of Motion for Separate Trial;

Findings of Fact and Conclusions of Law;  
Judgment;

Notice of Appeal;

Stipulation enlarging Time to File Designation;  
Designation of Contents of Record on Appeal;

Statement of Points; which together with a full, true and correct copy of Minutes of the Court had on February 28, 1955; one volume of reporter's transcript of proceedings; defendant's exhibit A; and plaintiff's exhibits 1 to 4, inclusive, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellants.

Witness my hand and the seal of said District Court, this 25th day of October, 1955.

[Seal]                  JOHN A. CHILDRESS,  
                            Clerk

/s/ By CHARLES E. JONES,  
                            Deputy

In the United States District Court for the Southern District of California, Central Division

No. 17,356-Y.—Civil

PACIFIC FREIGHT LINES and SIDNEY S.  
RUSSELL, Plaintiffs,

vs.

EUGENE A. PHELPS, and UNITED STATES  
OF AMERICA, Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, April 12, 1955

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiffs: Robert W. Stevenson and Anthony J. Calabro, by Anthony J. Calabro, 3257 Wilshire Blvd., Los Angeles 5, Calif. For the Defendant Eugene A. Phelps: Donald E. Wheeler, 106 West Third St., Los Angeles 13, Calif. For the Defendant United States of America: Laughlin, E. Waters, U. S. Attorney, by Joseph D. Mullender, Jr., Asst. U. S. Attorney. [1\*]

\* \* \* \* \*

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

## SIDNEY SPRINGER RUSSELL

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your full name, sir?

The Witness: Sidney Springer Russell.

## Direct Examination

\* \* \* \* [9]

Q. (By Mr. Calabro): What day was it, Mr. Russell, that this accident occurred?

A. February 5, 1954.

Q. Where were you going at the time of the accident?

A. I was going to Ludlow, California.

Q. In which direction were you traveling?

A. I was traveling east.

Q. What were you driving—what type of equipment? [10]

A. A tank truck and trailer, Sterling.

Q. How many units did that consist of?

A. Two.

Q. What time of the day did the accident happen?

A. At about 5:00 o'clock in the morning. [11]

\* \* \* \* \*

## Cross Examination

Q. (By Mr. Mullender): Mr. Russell, could you tell us about how far the scene of the accident was from Barstow?

A. I think it was about ten miles. I believe the

(Testimony of Sidney Springer Russell.)  
man that came out from our office said that it was eleven miles to the Barstow Hospital.

Q. And this accident occurred on Highway 66, did it? A. Yes, sir.

Q. And that road does run straight to Barstow, does it? A. That's right.

Q. You were headed in the direction towards Barstow; is that correct? A. That's right.

Q. What was the last town that you had passed before the scene of the accident?

A. I would say Victorville is the last town. There is Helendale and little things like that, but they are just service stations, that's all.

Q. How far back was Victorville?

A. I would say it was about 25 miles.

Q. So that you were at a point on Highway 66 between [26] Victorville and Barstow, approximately 25 miles from Victorville and ten miles from Barstow? A. That's right.

Q. Do you know where George Air Force Base is in relation to those places?

A. Yes, I do.

Q. Is George Air Force Base off of Highway 66? A. It is, yes.

Q. And is there a road from Highway 66 which goes to George Air Force Base?

A. Yes, there is.

Q. And had you passed that road?

A. Yes, I had.

Q. About how far back was that from the scene of the accident?

(Testimony of Sidney Springer Russell.)

A. Anyway 20 miles, maybe more than that, 25 miles.

Q. It is the other side of Victorville; isn't it?

A. Between Victorville—there is one road that turns off between Victorville and Barstow. It is about three miles, I guess, out of Victorville, east of Victorville, that you turn off to go to George Air Force Base.

Q. That turn-off was between Victorville and the scene of the accident?

A. Yes, that right. [27]

\* \* \* \* \*

Q. And you say the accident occurred about 5:00 a.m. in the morning of February 5th?

A. That's right, yes, sir.

\* \* \* \* \*

### GEORGE HAAG

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [29]

\* \* \* \* \*

### Direct Examination

Q. (By Mr. Calabro): Mr. Haag, what is your address, please?

A. Box 9, Helendale, California.

Q. Where is Helendale?

A. Helendale is approximately fourteen miles east of Victorville, and about the same distance from Barstow to it.

(Testimony of George Haag.)

The Court: It is in San Bernardino County?

The Witness: Yes, sir.

Q. (By Mr. Calabro): Did you witness the happening of an accident that occurred on February 5, 1954, on Highway 66 between Victorville and Barstow? A. I did.

Q. What time of the day did the accident happen?

A. Well, I don't know as I exactly noticed the time, but it was after 5:00 o'clock a.m. I would say between 5:00 and 5:30.

Q. Was it still dark, or daylight?

A. Dark.

Q. What were you doing?

A. I was on my way to work.

Q. Where was work at the time?

A. United States Government, Barstow Marine Base.

Q. What was your occupation?

A. Carpenter. [30]

Q. What were you driving?

A. A Chevrolet '38.

Q. Was that a 1938 Chevrolet?

A. Yes, sir, a 1938 Chevrolet.

Q. In which direction were you traveling?

A. East.

Q. And you come from Helendale?

A. Yes, sir.

Q. Were you living there at the time?

A. Yes, sir.

(Testimony of George Haag.)

Q. On what highway were you traveling?

A. 66. [31]

\* \* \* \* \*

### NORBERT J. SCHUERMANN

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

\* \* \* \* \*

#### Direct Examination

Q. (By Mr. Mullender): Mr. Schuermann, what is your business or occupation? [74]

A. I am a State traffic officer for the State of California.

Q. How long have you been so employed?

A. Since February of '52.

Q. Calling your attention to the date of February 5, 1954, did you investigate an accident which occurred on Highway 66 in the vicinity of Barstow?

A. Yes, I did.

Q. What time did you arrive at the scene of the accident? A. If I may——

Q. Will you please refer to your notes?

A. Our arrival was approximately 6:00 o'clock.

Q. Do you know what time that accident occurred?

A. We estimated the time of the accident was approximately 5:15 a.m.

Q. How did you arrive at that estimate?

A. By the statements of the witness and the driver.

(Testimony of Norbert J. Schuermann.)

Q. What time did you receive the call to report there? A. 5:30 a.m.

Q. Will you describe the vehicles that were involved in that accident?

The Court: Tell us, first, about the condition of the weather, that is, how was it? Was it light?

The Witness: Upon our arrival it was just getting daylight. [75]

The Court: Getting daylight?

The Witness: At the time of the accident it would be still dark.

The Court: But that part of the country, that desert, has a dawn that we don't have here in Los Angeles?

The Witness: Yes, but I mean at that time in the morning you still need your lights.

The Court: It is still pretty dark. All right.

The Witness: And the weather was clear, no smog or fog, and the visibility was unlimited in that section of the highway.

Q. (By Mr. Mullender): Will you describe the vehicles that were involved in that accident?

A. One was a 1951 Chevy four-door sedan, and the other was a Sterling tank truck and a trailer.

Q. Was there any indication on the tank truck and trailer as to who owned it?

A. Yes, there was.

Q. What was that?

A. The initials "PFL".

Q. Was there any indication on the Chevrolet as to who owned that car?

(Testimony of Norbert J. Schuermann.)

A. The color, and also "U. S. Air Force," and the identifying numbers "172892" were stencilled on the doors.

Q. From what you observed at the scene of the accident, [76] could you determine the directions of travel of the two vehicles prior to the collision?

A. From the tanker you could trace its path both previous to impact and after impact. There was nothing to indicate—no skid marks, or anything, to indicate the path of the Air Force vehicle prior to impact, and a series of gouge marks after impact to where it came to rest.

Q. Where did it appear that the truck had been struck?

A. The truck had been struck in the front portion; in other words, the bumper and the front portion of the vehicle.

Q. And was the truck proceeding east on Highway 66?

A. Yes, that is correct, proceeding east.

Q. Then did you conclude that the Government vehicle had been proceeding in the opposite direction? A. Yes.

Mr. Mullender: Your Honor, I would like to have Mr. Schuermann draw on the blackboard the relative place of this accident.

The Court: All right. He can draw his own if he does not like the diagram drawn there. You can turn the board around. There is another blackboard on the back. You can draw your own.

(Testimony of Norbert J. Schuermann.)

The Witness: May I have a piece of chalk?

The Court: Isn't there some chalk there in front?

(The chalk was handed to the witness.) [77]

Q. (By Mr. Mullender): Now, what I would like to have you do, Mr. Schuermann, is indicate on the blackboard Los Angeles, San Bernardino, George Air Force Base, and Barstow and Highway 66.

A. I will start with Los Angeles down here, and San Bernardino lies more or less just east of here. Then you go up over the pass, Cajon Pass, over to Victorville, and then continue on more or less east to approximately two miles outside of Victorville, with the road coming in—it would be on the left hand side as you were traveling east, and that is the George Air Force road, approximately two miles. Then it continues on, and placing Barstow here, the "d.c." approximately ten miles west of Barstow.

Q. All right. Will you mark "Barstow"?

A. All right. Barstow, Victorville.

Q. Now, will you indicate the distance in miles between Los Angeles and San Bernardino, please?

A. It is approximately 75 miles.

Q. And will you indicate the distance in miles from San Bernardino to Victorville?

A. Approximately 39 miles.

Q. Now, will you indicate the distance between

(Testimony of Norbert J. Schuermann.)

Victorville and the road that turns off to George Air Force Base?

A. It is approximately two miles.

Q. And will you indicate the distance between that [78] point and the place which you have marked as the scene of the accident?

A. Well, that would be approximately 24 or 25 miles.

Q. Will you indicate now the estimated mileage from the scene of the accident to Barstow?

A. That is approximately ten miles.

Q. Now, in light of your testimony, prior to drawing this diagram, is it true that the Government vehicle was proceeding from Barstow back toward George Air Force Base?

A. That's right.

Q. And the truck was proceeding in the direction from Victorville towards Barstow?

A. That is correct.

Mr. Mullender: I have no further questions.

The Court: All right.

Mr. Calabro: May I see the report that you used to refresh your memory from, please, Mr. Schuermann?

The Witness: Surely. (Holding document to counsel.)

The Court: You consulted it only about the date?

The Witness: About the date, the number on

(Testimony of Norbert J. Schuermann.)  
the Air Force vehicle, and the description of the other vehicle.

The Court: So far as the location and what you found, that you gave from your recollection?

The Witness: Yes, sir. [79]

\* \* \* \* \*

### BERNARD R. SNYDER

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Bernard R. Snyder.

Mr. Calabro: I am sorry, Mr. Witness. I didn't hear you.

The Witness: Bernard R. Snyder.

The Clerk: How do you spell Snyder?

The Witness: S-n-y-d-e-r.

### Direct Examination

Q. (By Mr. Mullender): Mr. Snyder, what is your business or occupation?

A. United States Air Force, Transportation Supervisor.

Q. How long have you been employed in that capacity?

A. Approximately eleven years now.

Q. Where are you stationed?

A. George Air Force Base.

Q. How long have you been stationed there?

A. Eighteen months. [84]

Q. Mr. Snyder, calling your attention to the

(Testimony of Bernard R. Snyder.)

date of February 4, 1954, do you recall receiving any orders regarding the dispatch of an automobile?

A. Yes, sir.

Q. And will you tell me what your orders were regarding dispatching automobiles on that day?

Mr. Calabro: To which we object on the ground that would constitute hearsay in regard to the plaintiffs, your Honor. I think what he might have been told by any of his superiors as against us, the two plaintiffs, would certainly be hearsay.

The Court: Oh, no. In all cases of this character, you want to remember that under the Federal Tort Claims Act, the test of liability is the same as that of a private employer under the law of the State.

Now, in case you sued an employer, the employer would have the right to show whether the employee was doing something that was required of him or not, and, of necessity, all those things would be hearsay as to you, and yet if they were not admissible, it would go by appearances, and merely say it was an Army truck, and, therefore, you could not get behind it. What they are going to show is whether this man was about Government business, whether he had authority to use the automobile, and that is always the case.

Mr. Calabro: I think it would be proper for this witness to testify as to what orders he may have given, but I don't [85] think that it is proper for him to testify as to what he was told.

The Court: Oh, it is very important to show, you

(Testimony of Bernard R. Snyder.)

know, what they call the chain of command in the Army. Weren't you in the Army?

Mr. Calabro: Well, I was subject to military regulations, but not by the Army.

The Court: Not by the Army, all right. But you know the chain of command is of great importance.

Mr. Calabro: Yes.

The Court: And it is important in this case to show authority, and to show the right to use the automobile.

Mr. Calabro: Well, I think that the defense has a right to introduce whatever evidence they can in so far as the orders that were given by this particular witness, but I don't—

The Court: How do we know he had authority to give them? He is going to show he was asked to do certain things, and that he did them in pursuance to that. Otherwise the question would arise as to whether he had authority. Do you see the point?

Mr. Calabro: I see the court's position, but I think the proper testimony in order to establish that prior order, if such were necessary, would come from the person who issued the order.

The Court: Oh, no. He can't testify to the orders, but [86] he can state that he was ordered to provide this or that. I don't know what his testimony is going to be.

Mr. Calabro: I don't either, your Honor, but I think it would be objectionable as hearsay.

The Court: No. Go ahead. Overruled.

The Witness: I was called from my headquar-

(Testimony of Bernard R. Snyder.)

ters, my superiors, to have a car proceed to the officers' billets and pick up a Colonel Joyal, and to proceed on to the International Airport at approximately between 1500 and 1600 hours in the afternoon.

Q. (By Mr. Mullender): After receiving that order, what did you do?

A. I wrote out a little mimeographed form we have in the transportation office, the person to whom it was to report to, who authorized it, and what time, and where he was to proceed to, and I immediately took that over to my dispatch office, and told my dispatcher to have one staff car proceed at the designated time.

Q. Did you give your dispatch man any specific instructions as to what he was to do, other than you have testified to?

A. To have it there on time, sir, that was all I said, and I told him the airman would take it.

The Court: What is the distance from where you were to the International Airport? [87]

The Witness: It is a little over 100 miles, sir.

The Court: All right.

Q. (By Mr. Mullender): Then the sum and substance of your order, which you had given, was to have the dispatch man make a car and a driver available to this officer at George Air Force Base to drive him to the International Airport?

A. Yes, sir.

Q. And was there any order given as to what

(Testimony of Bernard R. Snyder.)

the driver of that car was to do after he had taken the officer to the International Airport?

A. He was told to proceed to International Airport and return.

Q. And what time did this occur, again?

A. This—

Q. What time of day?

A. The telephone call, sir, that I received?

Q. The time that you dispatched the car.

A. It was between 1500 and 1600. In other words, 3:00 o'clock in the afternoon, or 4:00, along in there; approximately in there.

Q. 3:00 or 4:00 o'clock in the afternoon, or shortly thereafter? A. Yes, sir.

Q. Did you know at that time who the driver was that was finally dispatched with the car? [88]

A. Yes, sir. I knew the only man available at the present time.

Q. And who was that?

A. Airman Phelps.

Q. Is his name Eugene A. Phelps?

A. Yes, sir.

Q. Do you recall what happened after that, to your personal knowledge?

A. I beg your pardon?

Q. Do you recall, from your personal knowledge, what happened after that in regard to the dispatching of this car? A. No, sir.

Mr. Mullender: That is all.

(Testimony of Bernard R. Snyder.)

Cross Examination

Q. (By Mr. Calabro): What is your rank, Mr. Snyder? A. Tech. Sergeant.

Q. You got a call then, as I understand it, between 3:00 and 4:00 o'clock on that afternoon to have the car pick up an officer?

A. It was right in there.

Q. What time was the car supposed to pick up the officer? [89]

A. Approximately at that same time, sir.

Q. As soon as possible? A. Yes, sir.

Q. You didn't actually dispatch the car, but you just gave an order to somebody else to send Phelps out, is that right? A. That's right.

Q. So you don't know what time Phelps left, do you?

A. It was approximately right around in there, some time in there.

Q. Were you there when the order was given to Phelps?

A. That's right. I was the one that told Phelps to drive the car.

Q. It was not the dispatcher, then?

A. No.

Q. Were you the one that told him to go to Los Angeles and to pick up Officer Joyal?

A. I told him where to report to, sure did, and to slip into the dispatch office for a log purpose for the 90-day period.

Q. I see. But you actually had the conversation with Phelps before he left the Base?

(Testimony of Bernard R. Snyder.)

A. That's right, sir.

Q. What was Phelps' rank at that time?

A. I believe it was Airman Second Class. I am pretty [90] sure on that.

The Court: Is that an air depot there, or what is that?

The Witness: A Tactical Air Command, sir.

The Court: It is a Tactical Air Command?

The Witness: Yes, sir.

The Court: Does it have a name?

The Witness: George Air Force Base.

The Court: And the location?

The Witness: Victorville, California.

The Court: It is not exactly in Victorville, is it?

The Witness: No, sir. It is approximately five miles from Victorville.

The Court: As you go over the hill?

The Witness: Yes, sir. It is southwest, more or less, or I mean southeast.

The Court: You go over that big hill, and then it is beyond that?

The Witness: Yes, sir.

Mr. Mullender: May I show him the diagram, your Honor?

The Court: I beg pardon?

Mr. Mullender: May I show him the diagram drawn by the police officer, and ask him if that correctly shows George Air Force Base?

The Court: All right.

Mr. Mullender: Mr. Snyder, I show you a diagram which [91] was drawn by Officer Schuermann,

(Testimony of Bernard R. Snyder.) and he has indicated here that this line represents Highway 66, and that this rectangular square represents George Air Force Base, that this distance between George Air Force Base and the Highway is approximately four miles; that this point is Victorville, and the distance between the intersection of the road and Victorville is approximately two miles. Does that fairly represent the location of George Air Force Base?

The Witness: Yes, sir, it sure does. It sure does.

Mr. Calabro: Are you through?

Mr. Mullender: Yes.

Q. (By Mr. Calabro): You just got through telling us, Mr. Snyder, that at that time Mr. Phelps was what you called an airman second class. How many stripes would that entitle him to on his arm, sir? A. Two, sir.

Q. And what were his regular duties?

A. A driver, sir.

Q. Was he assigned to a car pool or a car detail of some sort?

A. He was assigned to the staff car section.

Q. What does that mean, the staff car section?

A. That means sedans, light and medium sedans.

Q. His regular duties then were to drive officers, as he was ordered to drive them, either to or from or within [92] or outside the Base?

A. That's right, sir.

Q. In order to entitle him to leave the Base, was he given some sort of authority, or permit, or pass?

(Testimony of Bernard R. Snyder.)

A. DD Form 110, sir, and my authority is to pass on them by my superiors.

Q. You used some letters and a number that really don't mean too much to me, Mr. Snyder. Would you tell me a little more about that?

A. That is your dispatch record. It gives the man's name, the type of equipment he is driving, and also the registration number, the date, and his destination.

Q. Then does he use this pass to show the man that he is leaving the Base? A. Yes, sir.

Q. And when he comes back into the Base?

A. Right, sir.

The Court: That is also his authority if he is hailed or hauled in by an M.P. who is wondering what he is doing away from his Base?

The Witness: That's right.

The Court: That is to show that he has a right to the pass and be away from the Base?

The Witness: Yes, sir.

The Court: And it is also a pass for the equipment? [93]

The Witness: That's right, sir.

Q. (By Mr. Calabro): So that it is a pass in the sense that it is a pass for him to be off of the Base while he is still actually on duty?

A. That's right, sir.

Q. Is it distinguished in any way from a liberty pass, or what is commonly known as a liberty pass?

A. It sure is, sir.

Q. Can you tell us what the distinction is?

(Testimony of Bernard R. Snyder.)

A. Well, it is an orange slip of paper, approximately six by ten inches.

Q. I am thinking in terms of effect rather than appearance.

A. In effect there is quite a bit of difference between a liberty pass and a driver's trip ticket. As I say, it has the date, the type of equipment, the registration number, and your admission number on your Form 9-75, which is your master log for each time the equipment goes out, and it has your number.

Q. Is it fair to say, Mr. Snyder, that a trip ticket is intended to regulate the conduct of the airman while he is off the Base, whereas a pass is intended merely for permission to leave the Base, and for the airman to do as he pleases while he is gone?

A. Yes, sir. It is to authorize him to be off the [94] Base or drive the vehicle on the Base out of the pool, and it logs your personnel you carry, the amount of gasoline you carry and your oil, and with your tonnage and poundage on it.

Q. Would you tell me whether or not—do you have the trip ticket with you?

A. No, sir, I sure don't.

Q. Does the trip ticket say anything to Mr. Phelps about how he is to return, or what road or route he is to follow?

A. No, sir. He is supposed to take the shortest and quickest route.

Q. That is not stated on the trip ticket?

(Testimony of Bernard R. Snyder.)

A. No, sir.

Q. Was there anything on the ticket that said he was not to return by going to Barstow first and then coming back?

A. Not to my knowledge, there wasn't.

The Court: Did he have to go through Barstow either way?

The Witness: No, sir.

The Court: Barstow, as a matter of fact, is out of the way?

The Witness: Right, sir.

Q. (By Mr. Calabro): Was there any type of order given to Mr. Phelps indicating at what time he was to return to the [95] Base?

A. No, sir.

Q. And is it fair to say, Mr. Snyder, that Mr. Phelps drove from George Air Force Base and left there at approximately 4:00 p.m., or some time prior thereto? A. Yes, sir.

Q. Were any arrangements—

The Court: How do you estimate the time it actually takes from the Base to the Airport?

The Witness: It all depends, sir, on what time of day you leave.

The Court: Supposing it was the middle of the afternoon, and when you are not likely to have much travel.

The Witness: In the middle of the afternoon, you would catch just about the off-duty time for people here in Los Angeles. We allow about three and one-half hours, sir.

(Testimony of Bernard R. Snyder.)

The Court: About three and one-half hours.

Q. (By Mr. Calabro): Is that one way?

A. Yes, sir.

Q. Was Mr. Phelps given any instructions in connection with his evening meal?

A. What do you mean by that, sir?

Q. Well, you testified that he left before 4:00 o'clock, so I am just assuming that he had not yet had what you would ordinarily call chow, so I am wondering whether or not there [96] were any instructions given to Mr. Phelps about when and where he was to have his evening meal.

A. The usual procedure on that, sir, when you are carrying an officer——

Q. I am sorry, Mr. Snyder, and I didn't mean to interrupt you that way, but I am just wondering what was done in this particular case.

The Court: I think the Sergeant should be allowed to explain what the procedure is, because we almost take judicial notice that there is a pattern that is followed, and that no particular instructions are given. He ought to tell us what is the rule in regard to what a man is to do who is away from camp for his evening meal.

Mr. Calabro: Your Honor, I think that the court is entitled to the benefit of the testimony concerning what, if any, specific directions were given, and then assuming there were none,——

The Court: I also take judicial notice of the fact that in the Army, like in any large organiza-

(Testimony of Bernard R. Snyder.)

tion, they do not handle these matters on an individual basis, and there must be rules.

Mr. Calabro: I see. I didn't know that the court was going to take judicial notice of those facts, because I was not aware of it.

The Court: It is one of the ordinary things of life, [97] but still I am not saying, and I just assumed it is so, that if a man is sent out to do 100 miles at 4:00 o'clock, there must be some rules or regulations as to where he is going to get his meal, and that it isn't likely that the officer is going to invite the private to have dinner with him at his club, or when he gets to his destination.

Mr. Calabro: This was a two-striper, your Honor.

The Court: That does not make any difference. He is still not an officer. I assume this was a Captain or a Colonel he was transporting. Who was he transporting?

The Witness: A Lieutenant-Colonel.

The Court: A Lieutenant-Colonel. He is still not a social equal, and he could not enter the Officers Club by the front door. I know, because I was a sergeant in the first World War, and I still remember the distinction.

Let's get back to it. If you want him to answer whether he was given anything, I will let him answer that.

Mr. Calabro: Yes, I think we should have him answer that question.

The Court: You can ask him if he was given

(Testimony of Bernard R. Snyder.)

anything special, and then if he says no, you can ask if there was any general pattern or rule so that the driver would know about it. Go ahead.

The Witness: No, there is no orders given out, but the usual procedure on that is that an officer,—a normal officer [98] will donate the man the money for him to get himself something to eat. That has been it in the past.

The Court: On the trip?

The Witness: Yes, sir. Of course, they don't eat with them.

The Court: Naturally.

The Witness: If they give the money to him, they go ahead and eat, but under conditions where they don't do it, he just has to wait until he gets back till he gets something to eat.

Q. (By Mr. Calabro): Unless he can afford to get it on himself? A. That's right.

Q. Then while Mr. Phelps is driving this automobile out of the Base, he has with him this trip ticket all the time; is that right?

A. Yes, sir.

Q. Then he turns it in after he gets back to the Base? A. Yes, sir.

The Court: Do you make an estimate when a soldier—let's call him that, and I like that general appellation—

The Witness: That's all right, sir.

The Court: When a soldier is sent out on a trip that you figure should take three and one-half

(Testimony of Bernard R. Snyder.)

hours each way, do you sort of make an estimate as to when he ought to be [99] back in camp?

The Witness: Well, we don't try to estimate it too close, due to the fact you have to allow for breakdowns and flat tires, or if something is wrong with the vehicle. On that occasion they will call to the Base and notify somebody there.

The Court: But he is not presumed—aside from possibly taking time out to eat, he is not presumed to stay out overnight—

The Witness: That's right.

The Court: —with the equipment, but he is presumed to come right back?

The Witness: That's right.

The Court: And to feed himself on the way, unless he has something unusual happen, in which event he calls in?

The Witness: Right, sir. That's right, sir.

The Court: So that assuming that he left, say, at 4:00 o'clock, and allowing him from seven to eight hours,—if you allow him eight hours, that would be the maximum that it would take, allowing for his time to eat, and so forth, and stops, and he should be back in camp within eight hours after the time he left? Is that a correct computation?

The Witness: Yes, sir.

The Court: And then, of course, he checks in, and he would check in the hour when he gets back?

The Witness: That's right, sir. [100]

The Court: The sentry would check him in when he got in, and you would note then the hour?

(Testimony of Bernard R. Snyder.)

The Witness: Right, sir.

The Court: All right.

Q. (By Mr. Calabro): Then, Officer Snyder,— I am sorry, Mr. Snyder, I take it, it is proper under your regulations for Airman Phelps to have accepted a dollar, or \$2.00 or something from this Lieutenant-Colonel Joyal for his meal for the evening; is that right? A. Yes, sir.

Q. And it would have been perfectly proper for Airman Phelps to stop somewhere after he had delivered Lieutenant-Colonel Joyal to the airport for his evening meal?

A. That's right, sir.

Q. And whatever time that would require, sir, would have been proper?

A. That's right, sir.

Q. Then outside of his meal and whatever breakdown trouble, if any, he had, why, his duty was to return this piece of equipment to the Base as soon as was reasonably possible?

A. Yes, sir; that's right, sir.

Mr. Calabro: No further questions. Thank you.

The Court: Any redirect?

Mr. Mullender: I was going to ask Mr. Snyder, your Honor, [101] about this trip ticket counsel has referred to.

The Court: All right.

#### Redirect Examination

Q. (By Mr. Mullender): Mr. Snyder, you say

(Testimony of Bernard R. Snyder.)

a trip ticket or Form DD 110 was prepared and given to Mr. Phelps; is that correct?

A. That's right, sir.

Q. When that trip ticket comes back when Phelps returns, would that normally go into the motor pool?

A. Yes, sir, go into the dispatch office, sir.

Q. And you say you don't have it with you today. Is there any reason why you do not?

A. Yes, sir. I don't know, but it seems as though it got lost somewhere on the way on this investigation that was being made on the accident the vehicle was involved in, and the whereabouts of it I don't know now.

Q. So the original ticket has been lost?

A. Yes, sir.

The Court: The chances are because he was hurt nobody bothered to search his pockets for that, and they were more interested in taking care of him. Isn't that true?

The Witness: Well, sir, it was picked up, but it was in a very frayed condition. It had been pretty well torn, and we tried to Scotch tape it back, but it was almost impossible. [102]

The Court: You remember seeing it then?

The Witness: Yes, sir.

Mr. Mullender: We have a copy of the trip ticket, your Honor, which I would like to show the witness.

The Court: All right. Is that a sample, or an actual copy?

(Testimony of Bernard R. Snyder.)

Mr. Mullender: No, it is an actual copy.

The Court: An actual copy, all right.

Mr. Mullender: It was a copy that was made before the original disappeared.

The Court: All right.

Mr. Mullender: I will ask the Clerk to mark this document for identification.

The Clerk: Defendants' A.

(Thereupon the document referred to was marked Defendants' A, for identification.)

Q. (By Mr. Mullender): Mr. Snyder, I show you Defendants' Exhibit A, for identification, which purports to be a copy of a Government form, and I ask you whether or not that represents a true copy of the trip ticket about which you have been testifying?

A. Yes, sir; it sure does, sir.

Q. Mr. Snyder, you will note that the time out is indicated as 1500.

A. Yes, sir. That is 3:00 o'clock, sir. I said between [103] 1500 and 1600 he departed, sir.

Q. You remember independently of this document that the time was approximately that time?

A. Yes, sir.

Q. I see here the signature of a man by the name of Partch. A. Yes, sir.

Q. Do you know him?

A. Yes, sir, I sure do.

Q. Who is he?

(Testimony of Bernard R. Snyder.)

A. He was the dispatcher at the time, which it says right on here, at the time dispatcher.

Q. And I see the name of "Philip E. Joyal, Lt. Col., USAF"?

A. That is the gentleman that Airman Phelps hauled to the International Airport, and this is where he released him. He has to put his release on here, that he arrived at his destination okay.

Q. And that Lt. Col. Philip E. Joyal was the man, the officer at George Air Force Base that Phelps was to transport?

A. Yes, sir. There was a little disturbance that the Colonel wrote on here, while he was on the road. I see there is a little notation on this Form DD 110 that Colonel Joyal made in reference to the engine knocking, and the driver [104] checked oil O.K.

Q. On the back of this form, Mr. Snyder—

A. Yes, sir.

Q. —there are two times filled in, one after the other. Could you explain that to me, please?

A. All right. Here is the destination (indicating), and from here he departs, which is the Base Motor Pool. They use "BMP."

Q. That is the place where you gave him this ticket? A. Yes, sir.

Q. And the time indicated there is 1455, which would be what?

A. Approximately 3:00 o'clock, lacking five minutes of it, and this is the arrival here.

(Testimony of Bernard R. Snyder.)

This is the out mileage, and it should be the same as it reads on the front. He went to Building 455 to pick up Colonel Joyal, where he was designated to go. That was the Officers Billet, and he arrived there at 1500 hours, and departed at 1505.

Q. Which was about the same time, 3:00 o'clock?

A. Yes, sir.

Q. And who writes this?

A. This is the driver's.

Q. In other words, the driver indicates he picked up Colonel Joyal at approximately 3:00 o'clock?

A. And he departed at 1505, which should be 3:05.

Q. And, I take it, he should put down the arrival time, when he arrived at Los Angeles?

A. At the airport, and then back to the Base Motor Pool, and his arrival there.

Mr. Calabro: I think we can also stipulate he never got back, can't we?

Mr. Mullender: Yes. I also want to show here that he made no entry, that is, the driver made no entry on the form after he left the Base. I just want to point that out for the record.

I have no further questions.

The Court: All right. It may so show.

Mr. Calabro: I have just one or two matters.

#### Recross Examination

Q. (By Mr. Calabro): This trip ticket seems to indicate that they seemed to have some trouble

(Testimony of Bernard R. Snyder.)

with the car, and had the tires and some other items checked.

A. What are you referring to here?

Q. I am looking at the row of "X's" under the "O.K."

A. This is your duty before operation. You just do this before you start your vehicle up.

The Court: Then that occurred before the trip?

The Witness: No, sir, this occurred while on the trip, when the Colonel made this notation.

Mr. Calabro: Apparently they were having some trouble with the car during operations, that there were some unusual noises and some disturbance.

The Witness: That's right.

Mr. Calabro: Nothing further.

Mr. Mullender: In light of the last question, may I ask the witness some questions about the condition of the car?

The Court: All right.

#### Redirect Examination

Q. (By Mr. Mullender): Mr. Snyder, do you know whether or not that car was in good working order when it left?

A. Sir, it had a new engine installed in it approximately two days prior to the departure to Los Angeles, so with a new engine there, and everything, there could have been some mechanical failure in it.

(Testimony of Bernard R. Snyder.)

Q. But the car had been thoroughly gone over prior to this trip? A. Yes, sir.

Mr. Mullender: I have no further questions.

The Court: All right. Let me see that document.

(The document was handed to the court.)

Mr. Mullender: I would like to offer the document in evidence.

The Court: It may be received.

The Clerk: Defendants' A in evidence.

(Thereupon the document heretofore marked Defendants' Exhibit A, for identification, was received in evidence.)



I CERTIFY THAT MAINTENANCE SERVICES HAVE BEEN COMPLETED AS CHECKED

DATE	GRADE	OPERATOR'S SIGNATURE
4 February 1954	A/2C	/s/ Phelps

VEHICLE EQUIPMENT OPERATIONAL RECORD						
				REG. NO.		
4 February 1954		S C		172892		
MATCHING ORGANIZATION N P		QUALITY OPERATOR		TIME		MILES
OPERATOR		OPERATOR		ACTION		TOTAL (End mil.)
<b>A/C</b>		<b>A/C</b>		IN		<b>REPORT TO</b>
<b>helps</b>		<b>ATCHER</b>		OUT		<b>Los Angeles</b>
<b>partch</b>		<b>A/C</b>		<b>TOTAL</b>		RELEASED BY (Signature and #) : <b>/s/ Phillip E. Joyal, Lt Col USAF</b>
OPERATOR		OPERATOR		IN		<b>REPORT TO</b>
OPERATOR		OPERATOR		OUT		RELEASED BY (Signature and #) :
OPERATOR		OPERATOR		<b>TOTAL</b>		<b>REPORT TO</b>
OPERATOR		OPERATOR		IN		RELEASED BY (Signature and #) :
OPERATOR		OPERATOR		OUT		<b>REPORT TO</b>
OPERATOR		OPERATOR		<b>TOTAL</b>		RELEASED BY (Signature and #) :
OPERATOR		OPERATOR		IN		<b>REPORT TO</b>
OPERATOR		OPERATOR		OUT		RELEASED BY (Signature and #) :
						<b>TOTAL</b>

PREVENTIVE MAINTENANCE SERVICES		REC. NO.	TYPE	ADM. NO.	
DAILY BEFORE OPERATION	O. K.	ADJUST	REPAIR	2. DURING OPERATION	O. K.
FUEL, OIL, WATER	X			CHECK INSTRUMENTS	ADJUST
TIRE	X			UNUSUAL NOISES	REPAIR
LEAK AND DAMAGE	X			<b>Los Angeles</b>	
SAFETY DEVICES	X			OFF POST	
ACCIDENT REPORT ACCIDENT IDENTIFICATION CARD					
I HAVE NOTED ALL ENTRIES ON THIS FORM AND HAVE KEN THE NECESSARY ACTION INCLUDING ARRANGEMENTS DISPATCHER'S SIGNATURE AND GRADE					
<b>Engine was knocking, Driver checked oil O K</b>					
/s/ Patch 2/2C					
AUTH BY <b>/S/ P. E. Jova, Lt. Cpl.</b>					



(Testimony of Bernard R. Snyder.)

Mr. Wheeler: The defendant Phelps would like to ask Sergeant Snyder two short questions.

The Court: Go ahead.

Q. (By Mr. Wheeler): Mr. Snyder, you are Phelps' immediate superior in the chain of command; is that correct? A. I was at the time.

Q. You were at the time of all this difficulty?

A. Yes, sir.

Q. What time was Phelps available for duty on the morning of February 4th, the day preceding the accident?

A. What time was he available for duty that morning?

Q. Yes.

A. Well, roll call was at 0730 hours in the morning. Right offhand I could not tell you for sure if he was there or not, because I don't have my roll call sheet, but I believe he was.

Q. I realize the military draws a distinction, that [108] all men are on duty status when they are on the base, but was it customary for the men in the pool to report at 7:30 a.m. and be available for whatever military duties would be required?

A. Yes, sir.

Q. What time is reveille at George Air Force Base? A. At 600 hours, sir.

Q. Directing your attention to the date February 3rd, the day preceding the date that this departure took place that we are all concerned with, are you aware of any unusually long performance of duty by Airman Second Phelps?

(Testimony of Bernard R. Snyder.)

A. I can't make a statement on it, sir, because I don't know.

Q. I am just asking you if, from your recollection, you recall that he was on duty in excess of ten hours?

A. It is possible, sir, because we was running pretty heavy on runs there, and rather short of personnel at the time.

Mr. Wheeler: That is all.

The Court: There are some notations here on the back, and I gather that they indicate something, so I wish you would explain them to me. On the back here are these notations, "Destination, Arrival, Departure," and so forth.

The Witness: All right. He had departed from the Base Motor Pool. That is the Base Motor Pool he left from, and he left at 1455 hours. This is the out mileage when he left the pool, and his load was none. These are the operator's initials, and he went to Building 455, which is the Officers Billet, where Colonel Joyal was at. He arrived at 1500 hours and departed at 1505, which is 3:05. His arrival mileage was 48,528. In other words, he went one mile from the Motor Pool to Building 455, and proceeded on to Los Angeles.

The Court: And after that he made no entries?

The Witness: No entries.

The Court: Go ahead.

Mr. Calabro: No further questions on the part of the plaintiffs.

The Court: All right, step down.

\* \* \* \* \*

## DAVID D. PARTCH

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir? [110]

The Witness: David D. Partch, P-a-r-t-c-h.

## Direct Examination

Q. (By Mr. Mullender): Mr. Partch, what is your business or occupation?

A. U. S. Air Force, sir.

Q. And where are you stationed?

A. George Air Force Base, California.

Q. How long have you been stationed there?

A. 23 months.

Q. What are your duties at George Air Force Base? A. Vehicle dispatcher.

Q. How long have you been so employed?

A. 21 months.

Q. Calling your attention to February 4, 1954, do you recall dispatching a vehicle for transporting a Lt. Col. Philip E. Joyal?

A. Yes, sir, I do.

Q. Can you tell me just what occurred prior to that dispatch?

A. Well, I got a request from Sgt. Snyder, who was my UIC at the time, requesting or saying that a staff car was to first pick up Lt. Col. Joyal at the BOQ, and then proceed to Los Angeles.

Q. And what did you do? [111]

A. I made out a trip ticket, putting in Phelps'

(Testimony of David D. Partch.)

name as the driver, and my own as the dispatcher, and where he was supposed to go to.

Q. Mr. Partch, I show you Government's Exhibit A in evidence, and I ask you if that is a true copy of the trip ticket you have just referred to?

A. Yes, sir, it is.

Q. Do you recall at what time—Independent of this, do you recall, from your own knowledge, at what time you dispatched this car to Phelps?

A. It was between 1500 and 1530.

Q. Which would be between?

A. 3:00 and 3:30 in the afternoon, p.m.

Q. Would that be what you have indicated on your trip ticket? A. Yes, sir.

Q. And did you give any orders to Phelps when you dispatched the car to him?

A. Not other than just taking the staff car and picking up Lt. Col. Joyal and taking him to Los Angeles.

Mr. Mullender: I don't think I have any other questions.

The Court: Any questions?

Mr. Calabro: No questions.

The Court: Any questions?

Mr. Wheeler: Yes, please, your Honor. [112]

#### Cross Examination

Q. (By Mr. Wheeler): Sergeant, what was your rank at the time that this incident occurred?

A. Airman Second Class, sir.

(Testimony of David D. Partch.)

Q. So that you were on a level then with Airman Phelps at the time? A. Yes, sir.

Q. That is, he and you were both of the same rank? A. Yes, sir.

Q. And as far as you know, you gave him—as far as you recall, I should say, you gave him no orders in connection with what time he was supposed to get back, or how he was supposed to get back? A. No, sir.

Q. Do you have any knowledge—you are a sergeant now are you not?

A. No, sir, Airman First Class.

Q. Airman First Class. I am sorry. Do you have any knowledge now as to what duties Airman Phelps performed on February 3, 1954?

A. Well, that's kind of hard to say, because at the time we were real short of drivers in the Motor Pool, and we was using everybody as much as we could, and some more than we should. [113]

Q. By that do you mean that they were working long hours? A. Yes, sir.

Q. Do you know whether or not Sgt. Phelps had any driving duty on the morning of February 4th?

A. That I couldn't say, sir. I wouldn't say for sure. It is more than likely he did, but I wouldn't say for sure.

Mr. Wheeler: Nothing further.

Mr. Mullender: No questions.

The Court: All right, sir, you may be excused.

\* \* \* \* \*

## CLARENCE C. SMITH

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Smith, Clarence C.

## Direct Examination

Q. (By Mr. Mullender): Mr. Smith, what is your business or occupation? [114]

A. Credit manager at the Biltmore Hotel, Los Angeles, California.

Q. And how long have you been so employed?

A. Since October, 1938.

Q. What are your duties as credit manager at the Biltmore Hotel?

A. Full charge of credit and relations with respect to guest records, registrations, and all records pertaining to the front office.

Q. As such, do you have custody of the records relating to the registration and time of arrival and departure of guests in the hotel? A. Yes.

Q. Do you have in your custody and possession any records and registration relating to Lt. Col. Philip E. Joyal of the United States Army Air Force?

A. I have a registration for the year date of 1954, dated—

Q. Excuse me. Have you brought those records with you? A. Yes, sir.

Q. Will you describe them to me, please?

A. I have a record of a registration for the year

(Testimony of Clarence C. Smith.)

of 1954, dated time-coded February 4th, 6:05 p.m., 1954, signed "Philip E. Joyal, Lt. Col., 8149-A, Headquarters Air [115] Force Defense Command, 1609 West Cheyenne Road, Colorado Springs, Colorado."

Q. What does that record indicate?

A. That indicates the Colonel—or it indicates a registration under the—

Q. Under the name of Lt. Col. Philip E. Joyal?

A. Yes. Assigned to Room 10340, with a rate of \$5.00, a military rate, so marked.

The Court: You want to be sure the rest of us don't get it; is that it?

The Witness: Right.

The Court: All right.

The Witness: Made by Room Clerk 16 of our regular staff, with a notation of checkout date of February 5th.

Q. (By Mr. Mullender): I see. Does this printed notation in the upper left hand corner indicate the time that the person registered under that name?

A. Yes, that is the regular proceeding of the registration and the time-clocking at that time.

Q. I see. When the guest signs this card, it is then put under the time-clock and the time is recorded there? A. After he has signed.

Q. After he has signed? A. Yes, sir.

Q. Do you have any other records you brought with you [116] pertaining to this?

A. The record of the room folio of the Biltmore Hotel of Lt. Col. Philip E. Joyal, assigned to Room

(Testimony of Clarence C. Smith.)

10340, at the rate of \$5.00, at 2-4-54, Headquarters Air Force Defense Command, 1609 West Cheyenne Road, Colorado Springs, the same time, 6:05 p.m.

Q. Excuse me, sir. Would this record be made from that other record that you have just shown me?

A. Yes, this is the record made from the registration.

Q. Does that record indicate the time the man checked out of the hotel? A. Yes, sir.

Q. Where is that indicated on there?

A. This records the room charge under date of February 4th of \$5.00, and under date of February 5th, showing the account was paid, stamped by the cashier "Paid," cashier No. 14, and so time-clocked February 5th at 6:16 a.m., 1954, which coincides with the time-clocking of the registration, which was with the account at the same time.

Q. I see. Would these records indicate to you that a person registered in the Biltmore Hotel on February 4, 1954, at 6:05 p.m., and checked out on February 5, 1954, at 6:16 a.m.?

A. That is our usual procedure on these documents.

Mr. Mullender: Thank you very much, sir. No other questions. [117]

Mr. Calabro: No questions for the plaintiffs.

The Court: All right. We will let you keep your records this time.

The Witness: Thank you.

(Testimony of Clarence C. Smith.)

The Court: All right. By the way, the record shows he was alone in the room?

The Witness: He registered singly, yes, sir.

The Court: Singly. All right.

(Witness excused.)

Mr. Mullender: Your Honor, for the next witness I would like to call the defendant Eugene A. Phelps.

Mr. Phelps, will you take the stand, please?

The Court: All right. Are you calling him under 43(b), as an adverse witness, or what?

Mr. Mullender: I believe he will be adverse, yes, your Honor.

The Court: You had better announce what you are doing. I am not running the case for you, but if you are calling him as an adverse witness, you had better announce it as such, and then you can ask him leading questions, under 43(b).

Mr. Mullender: Well, your Honor, if the witness turns out to be adverse—

The Court: Oh, no, no. That isn't the point.

Mr. Mullender: Well, he is not adverse to us on the pleadings, your Honor. He is not opposed to us. [118]

The Court: Then you are calling him as your witness. That is the point. There is one way to call him, and then impeach him if he proves to be an adverse witness, but this is not an adverse witness. He is an adverse party if he is taking a position contrary to yours, and then you may be able to examine him that way. He is not a hostile witness.

Mr. Mullender: Of course, your Honor, I would rather call him as an adverse witness, but I don't believe under the state of the pleadings I would be entitled to, so I think therefore I will call him—

The Court: All right, you call him. Go ahead.

EUGENE A. PHELPS

one of the defendants herein, called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Eugene A. Phelps.

Direct Examination

Q. (By Mr. Mullender): Mr. Phelps, what is your business or occupation?

A. I am employed in the United States Air Force right now, sir.

Q. What are your duties? [119]

A. I work in the tire shop at the Base now.

Q. What were your duties on or about February 4, 1954?

A. Well, I was a driver in the staff car section. I was supposed to be what they call—

The Court: Speak a little louder, please.

The Witness: I was in charge of the staff car section at that time.

Q. (By Mr. Mullender): Was that at George Air Force Base? A. Yes, sir.

Q. Do you recall that on February 4, 1954, you were assigned to drive an officer to Los Angeles?

(Testimony of Eugene A. Phelps.)

A. Yes, sir.

Q. Will you tell me how the situation arose?

A. Well, sir, it was about five minutes to 3:00, and I was over to the office, and Sgt. Snyder got a request to take this officer to Los Angeles, so I had to go change my clothes, get ready, take a staff car, pick up the officer, and take the officer to Los Angeles.

Q. Do you recall the name of that officer?

A. Yes, sir, Lt. Col. Joyal.

Q. And was a trip ticket made out and given to you for this trip? A. Yes, it was.

Q. Mr. Phelps, I show you Defendants' Exhibit A in [120] evidence, and ask you if that is a true copy of the trip ticket that was given to you at that time? A. Yes, sir, it was.

Q. That indicates that you were checked out with this car at approximately 1500 hours, which would be about 3:00 o'clock? A. Yes, sir.

Q. And the officer you were to transport would be the man whose name appears here, Philip E. Joyal, Lt. Col.? A. Yes, sir.

Q. After you received this trip ticket, Mr. Phelps, what did you then do?

A. Well, I proceeded on up to the officers' bachelor quarters there and picked up the colonel. I had to wait for him for about fifteen minutes, so I got ready, carried his bag up to the car, and we checked out of the Base at approximately 3:30, or somewhere around there, or a quarter to 4:00.

(Testimony of Eugene A. Phelps.)

Q. So then you and Lt. Col. Philip E. Joyal left the Base in this car at about 3:30?

A. Yes, sir.

Q. What orders were given to you when the car was dispatched to you?

A. The orders I was given was that I was supposed to take him to L.A. International, but we got on the road, [121] and we were about seven miles from the Base, and he told me then that he wanted me to take him to the Biltmore Hotel instead.

Q. Were you given any orders as to what you should do after you left the Colonel at the International Airport?

A. They don't tell you anything. You are told once to take the officer to the destination, and you make a quick trip back to the Base.

Q. Then it was your understanding that after you left the colonel off at his destination, you should return immediately to George Air Force Base? A. Yes, sir.

Q. You say the colonel told you to take him to the Biltmore instead; is that correct?

A. Yes, sir.

Q. And did you take that as a change in your orders? A. Yes, sir.

Q. And then what did you do?

A. I proceeded on to take him to the Hotel Biltmore.

Q. About what time was it you arrived at the Biltmore? A. Approximately 1800 hours.

Q. What time would that be?

(Testimony of Eugene A. Phelps.)

A. 6:00 o'clock.

Q. What did you do after that?

A. Well, I gassed up, and checked the oil, and started [122] back.

Q. Where was it that you did that?

A. Some gas station here in Los Angeles. It was a Chevron Gas Station, about a block and a half or better from the Biltmore Hotel.

Q. It was right downtown? A. Yes, sir.

The Court: What time was it, according to your recollection, that you arrived at the Biltmore Hotel?

The Witness: About 6:00 o'clock, sir.

The Court: What?

The Witness: About 6:00 o'clock, I figure.

Q. (By Mr. Mullender): That was on February 4th? A. Yes, sir.

Q. Now, after you gassed up, what did you do?

A. I started back for Victorville, and I stopped and got something to eat.

Q. Where was that?

A. Just outside of Pasadena.

Q. What time was that?

A. Oh, about 8:00 o'clock. No, about 7:30, about 7:30 it was.

The Court: We are still talking about the same day, the 4th?

The Witness: Yes, sir. [123]

Q. (By Mr. Mullender): Where did you go after that?

Mr. Wheeler: Your Honor,—

(Testimony of Eugene A. Phelps.)

The Court: Yes.

Mr. Wheeler: —on behalf of the witness, I would like to claim the privilege under the Fifth Amendment, the privilege against self-incrimination, and, if the court please, I think the proof is far enough along that we can make a little short intelligent statement on this, if we may, to the court at this time. It is a question as to the witness' privilege.

The Court: I don't see where there is any question of self-incrimination. We are entitled to have an explanation of how he happened to be on the Barstow road. I am not interested in anything else. So far as that inquiry is concerned, I cannot see any tendency to incriminate him.

Mr. Wheeler: Well, may I make a short statement, your Honor?

The Court: Yes.

Mr. Wheeler: We know that this man was assigned by the military to proceed to the Los Angeles Airport, and that his orders were altered by the officer in the car, and that he arrived here at about 6:00 o'clock that evening. This man is then still subject to military law, although he is not on a military reservation or post at the time, but he is under severe penalties under military law, under the Uniform Code of Military Justice. [124]

The Court: I happen to know something about the Code. I wrote the first opinion under it.

Mr. Wheeler: I am aware of that, your Honor, and I have read your opinion on it.

(Testimony of Eugene A. Phelps.)

The Court: All right. I can't see what problem can arise here.

Mr. Wheeler: Well, the minute that this man on the stand makes a statement under oath that he has failed to carry out his orders, or the routine to proceed as quickly as is lawfully allowed to return to Victorville, it is possible to commence to draw charges and specifications according to the Code.

The Court: Well, you see, that is why you would have been in a better position if he were not a defendant, or if you had not appeared, except appeared possibly by default, and he would have admitted that, so far as he was concerned, he was negligent. But you have come in here and have made certain assertions denying the allegations in the complaint.

I am quite aware of the nature of the Fifth Amendment, and I have written quite a number of opinions on it, and articles relating to it, but when you come in and make a defense to an action, then when you are put on the stand, you cannot say, "I am not going to answer that for fear of incrimination."

I cannot see at the present time how there is any [125] tendency to incriminate him. It is already apparent that he was out of the way, because the road to this Post does not go by way of Barstow.

We have a record showing that he dropped his fare at the Biltmore here at 6:05 p.m.

Mr. Wheeler: Yes, sir.

(Testimony of Eugene A. Phelps.)

The Court: Now, I am not very much concerned with whether it was changed. As a matter of fact, possibly the officer may have found out that there are buses that take you from the Biltmore to the International Airport, and he may have decided rather than take a chance on it, to stay overnight and take a bus from there to the Airport, rather than to keep the soldier there until he got transportation. I don't know, and the record does not show what transportation the officer had after he reached here.

Now, we have a statement that this witness went back, and that he ate at 7:00 o'clock.

Mr. Wheeler: Yes, sir.

The Court: Now, it is very important from the standpoint of the Government whether this occurred while he was in the course of duty.

Mr. Wheeler: Yes, sir.

The Court: Under the law of California, and the general law,—of course, a little deviation on a return trip both in time and space does not matter, but if a man who had [126] dropped his charge at 6:05 p.m. is found in Barstow far away at 5:00 o'clock the next morning, and in an accident, the question arises whether he was at that time on his return trip on the duty he was supposed to be performing.

There is a famous case referred to in the Restatements, where an employer sent a man to go and sell goods in Albany, and he wound up in Schenectady, and it was decided that he was told to go

(Testimony of Eugene A. Phelps.)

to Albany, and not to Schenectady. There are California cases, and there is a case in the Supreme Court of California where a driver was told to go to a certain place to pick somebody up and then go back to the office, and instead of that he picked up a woman, gave her a ride far out of the way, and then went back to his office, and the court held that was outside of the scope of his employment.

Now, the case is governed by State law, so it is very important from the standpoint of the Government that we find out how he came to be in Barstow.

Mr. Wheeler: But, your Honor, I would like to submit that the military might be very much influenced in how this man could be in an accident at 5:00 a.m. in the morning 20 miles beyond his duty station.

The Court: That is not the point. We are not concerned with that here. The Government has the right to prove its case. The Government is not liable unless he was in the course of employment, and he is the only person who can explain [127] how he happened to be 25 miles away ten hours after, according to his own statement, he left Pasadena. Or, that is more than ten hours.

Mr. Wheeler: I would like to suggest to the court—

The Court: That is nine hours, I think.

Mr. Wheeler: —that there are other witnesses here available in the courtroom, if the Govern-

(Testimony of Eugene A. Phelps.)

ment desires, that will not place this man under this tremendous hazard.

The Court: I don't see that there is any hazard, or that he is admitting anything. It is already shown in the record that he was found unconscious in an accident at 5:00 o'clock in the morning. That is from 7:00 to 12:00—that is nearly ten hours after he had presumably started back to camp, and the location shows that Barstow is not on his route.

Mr. Wheeler: Yes, but wouldn't the circumstances reasonably make a difference in the distance?

The Court: That is not the point. I am a trier of the facts, and I have to determine whether he was in the course of his employment at the time. The mere fact that he was found there,—supposing the facts show that he had some engine trouble, and that he went to Barstow in order to repair the engine, and did not call up. There are all sorts of things that might arise. How am I, as a trier of the facts, to determine liability? There is a suit here for \$25,000 personal damages, and we have already accumulated, if I can add it up [128] correctly, over \$3,000 in special damages to the car, and \$168.00 for medical bills. Then general damages are prayed for.

I want to protect this man, but I cannot, for two reasons. In the first place, he has appeared in this case, and he has filed an answer denying the allegations. As a matter of fact, he could be called as an

(Testimony of Eugene A. Phelps.)

adverse party, because if the Government denies he was in the course of his employment, then they are not joint tortfeasors, and then he is just as adverse as anybody can be to the Government. But I cannot see that his explanation—I am not interested in whether he had anything to drink or not. That has nothing to do with it, because if an employer sends out an employee on a straight line, and he gets drunk, if he is in the course of duty, it is the employer's bad luck. The law says you, having made it possible by putting on a man who is likely to get drunk, ought to take the responsibility.

That is not the point here. The point here is that he was apparently not on his road back. He was long overdue by the longest route. What was he doing in Barstow at that time of the morning? He had left the colonel at the Biltmore at 6:05 p.m., and he himself had started back through Pasadena, and stopped to eat there.

I am sympathetic with him. I do not want to make any record here that will stare him in the face before a board, [129] but he has appeared, and he is the only man who can tell us.

How am I going to tell that there was nothing wrong with the car? There is a notation there that there was something wrong with the car, but evidently he fixed it before he left. He is the only one who can explain to us how he happened to be where he was at that time in the morning, and the Government is entitled to that.

(Testimony of Eugene A. Phelps.)

Mr. Calabro: May I have just a second, your Honor, to talk to counsel?

Mr. Wheeler: There has been a suggestion made, your Honor,—I realize fully the Government's dilemma, and also the dilemma the man faces of possible dishonorable discharge and a considerable period of time in excess of the amount of the damages, if the man's wages are worth anything, not to count his loss of freedom under certain sets of facts. Would the court consider testimony from this man as to what transpired from the time after he left San Bernardino and headed on Route 66 on through to Barstow?

The Court: The main point is this: You see, I have to determine whether the matter is of a type that will incriminate him.

Mr. Wheeler: Yes, sir.

The Court: I cannot see at the present time that that is of a character that it would incriminate him.

Mr. Wheeler: Well, if this man—— [130]

The Court: Will you get me my opinion in Shibley vs. United States.

Mr. Wheeler: Here is what I would like to suggest to the court, your Honor,—

The Court: Then there is no showing here—now, of course, the plaintiff is interested, but I don't think it is very proper for you to be on the other side, or for you to be there.

Mr. Calabro: I am awfully sorry, your Honor.

The Court: I don't want you to advise your op-

(Testimony of Eugene A. Phelps.)

ponent, because he is supposed to be your opponent. Otherwise, I will think that you were not acting in good faith when you made this soldier a defendant. I know you want to stick the Government, but it is up to me to determine whether the Government is liable. Let his own lawyer argue this matter. You are not supposed to be advising your adversary.

Mr. Calabro: I am sorry, your Honor. I am sure that there was nothing improper in the conference that I had with opposing counsel. I am trying to facilitate—

The Court: If you are so sympathetic to the soldier, dismiss as to the soldier. If you want to save the soldier embarrassment, dismiss as to him, and base your case upon the Government. It is too late for the Government to ask that he be brought in, and it would not make any difference anyway, in view of the recent decisions. Let me see,—what is the date? You can dismiss against him if you are so [131] sympathetic to his cause,—

Mr. Calabro: I am sorry, your Honor.

The Court: —and stake your case on your main showing against the Government.

Mr. Calabro: Well, dismissing, your Honor, as against the individual defendant is not going to change the issues in this case, and it is not going to change the facts which are going to come before the court.

The Court: Well, I could say that, if he is no

(Testimony of Eugene A. Phelps.)  
longer a defendant, I might be more inclined,—I  
do not say that I will—

Mr. Calabro: I understand.

The Court: —but I might be more inclined to sustain an objection to this inquiry lest it might incriminate him. At any rate, let counsel work it out.

Mr. Wheeler: Yes, sir.

The Court: I can't see that this would have a tendency to incriminate him.

Mr. Wheeler: I suggest to your Honor that there will be evidence that is available if this man is questioned under oath that he was drinking in the town of San Bernardino.

The Court: I don't think that is material to the case.

Mr. Wheeler: But if he does not claim his self-incrimination privilege, you have a statement under oath which any competent member of the Judge Advocate General's force is [132] dutybound to prosecute this man for.

The Court: I don't think at the present time there is any question before the court that is of a character so that the court can say it would incriminate him at all.

Mr. Wheeler: Yes, sir. For the purposes of the record, would you direct the witness to answer so that the record will show that he has not waived his privilege, in case there is a subsequent court-martial, and so that the man later is not faced with a waiver?

(Testimony of Eugene A. Phelps.)

The Court: You have made your objection, and I am going to direct the witness to answer upon the ground that the nature of the inquiry is such that the answer is not of a type that it might incriminate him,—any answer he might make. All right.

Q. (By Mr. Mullender): Mr. Phelps, you said you had dinner about 7:00 o'clock. That was where?

A. Just outside of Pasadena.

Q. Just outside of Pasadena. Now, what did you do after that?

A. Well, I drove on in to San Bernardino, and went out to one little tavern out there and had a couple of beers.

Q. What time was that that you arrived in San Bernardino?

A. I am not positive of the time.

Q. Approximately? [133]

A. Oh, probably 8:00 or 8:30, a quarter to 9:00, somewhere in there.

Q. Some time between 8:00 and 9:00 o'clock when you arrived in San Bernardino?

A. Yes, sir.

Q. And you say you went to a tavern?

A. Yes, sir.

Q. And what was the name of that place?

A. The Silver Saddle.

Q. The Silver Saddle. And that was in San Bernardino? A. Yes, sir.

Q. What did you do at the Silver Saddle?

A. Drank a couple of beers.

(Testimony of Eugene A. Phelps.)

Q. Do you recall exactly how many beers you drank? A. No, I don't.

Q. How long were you at the Silver Saddle?

Mr. Calabro: I am going to object, your Honor. The court has indicated that this type of matter is not admissible.

The Court: I want to get the lapse of time, when he left, and how he got to Barstow. That is what I am interested in more than anything else.

Q. (By Mr. Mullender): Do you know how many beers you had at the Silver Saddle?

Mr. Calabro: I am going to object again on the ground it is wholly irrelevant and immaterial if this man saw fit [134] to have a beer—

The Court: It does not lie in your mouth to object. Please don't consider yourself to be his attorney. He has an attorney. You stick to being the attorney for the plaintiffs, please. You have no right to object to any questions asked of a man who is not your client.

All right, go ahead.

The Witness: I don't recall how many I had.

The Court: All right. Let me take over. What did you do after that?

The Witness: Well, I left the Silver Saddle and started back to Victorville and I was pretty tired, so I picked up a guy that was in uniform, and asked him if he would drive into Victorville for me, and wake me up when we got to the share-your-ride station in Victorville, and I would drive on out to the Base, and instead the party drove on all

(Testimony of Eugene A. Phelps.)

the way into Barstow, and he woke me up, and I started back, and I had the accident.

The Court: He drove you to Barstow?

The Witness: Yes, sir.

The Court: Did you sleep in the car at Barstow?

The Witness: No, sir; not that I remember.

The Court: Well, when did he get out?

The Witness: Oh, approximately a quarter to 5:00.

The Court: In the morning? [135]

The Witness: Yes, sir.

The Court: And then you yourself started back to Barstow?

The Witness: Back to Victorville.

The Court: Back to Victorville at that time?

The Witness: Yes, sir.

Q. (By Mr. Mullender): What time was it when you left the Silver Saddle and started towards Barstow?

A. Oh, it must have been midnight.

Q. Are you sure of the time?

A. No, sir, I am not.

Q. What time does the Silver Saddle close?

A. 2:00 o'clock.

Q. Did you leave before it closed?

A. Yes, sir.

Q. And what time did you arrive in Barstow?

Mr. Calabro: I am going to object to that, your Honor, on the ground it calls for the conclusion of the witness.

(Testimony of Eugene A. Phelps.)

The Court: Oh, it is very important. Overruled.

Mr. Calabro: For the record, your Honor, I would like to complete my objection. The witness has heretofore testified that when he arrived at Barstow he was asleep, so any estimate which he might make of the time that he arrived in Barstow would be wholly speculative. He would have no knowledge to base it on.

The Court: That goes to weight, not to admissibility. [136] Overruled. You may answer.

The Witness: Will you repeat the question?

(The question was read.)

The Witness: I could not be positive of the time from the time I started back. It could have been right around 4:30 or a quarter to 5:00.

Q. (By Mr. Mullender): Is that the time you woke up in Barstow?

A. I didn't pay no attention to the watch, or anything. He just got out and told me, "Thanks a lot." And I said, "Well this sort of fixes me up fine." And then I started back, and I had the accident.

Q. Where did you pick up this hitchhiker?

A. Down here at the junction, or down there in San Bernardino. It is right there,—I think there is an island there, and it is right there on the corner of 395 and 66 junction, right there.

Q. How long was that after you left the Silver Saddle Cafe at about 12:00 o'clock?

A. Oh, it couldn't have been—it couldn't have

(Testimony of Eugene A. Phelps.)

taken over ten or fifteen minutes to drive across town to get there.

Q. So it must have been around 12:30, then?

A. Somewheres around there. I am not positive.

Q. Then from that time, approximately 12:30, until [137] the time you woke up in Barstow, was a little longer than four hours; is that correct?

A. Yes, sir.

Q. Do you know the distance in miles between that point where you picked up the hitchhiker and Barstow? A. Yes, sir, I do.

Q. How many miles is that?

A. It is about 66 miles, or a little better. Oh, it is better than that. It must be around 70.

Q. And it took you four hours to travel that distance; is that correct? A. That's right.

Q. Can you describe this hitchhiker?

A. Well, he about about five-ten and one-half, I couldn't see his hair because it was dark. That is just about all I can tell you about him. He was just a common ordinary G.I.

Q. Was he a civilian or in uniform?

A. He was in uniform.

Q. What branch of the service was he in?

A. If I remember correctly, I think he was in the Marines. Either the Marines or the Army. I am not positive.

Q. Do you know whether or not there is a military base in Barstow?

A. Yes, sir, I know that there is. [138]

Q. Had he told you where he was going?

(Testimony of Eugene A. Phelps.)

A. No, sir, he didn't.

The Court: Did you tell him where you were going?

The Witness: I told him where I was going, sir, yes.

The Court: You had made the trip from the Base to Los Angeles Airport before?

The Witness: Yes, sir, I had.

The Court: And Barstow is not on the road, is it?

The Witness: No, sir, it isn't.

The Court: It is out of the way all together, is it not?

The Witness: Yes, sir.

The Court: And to go by way of Barstow would be how many miles out of your way,—if you went to the Base by way of Barstow?

The Witness: I couldn't tell you, sir. I know it would be far enough out of the way, but I wouldn't know the mileage.

The Court: You wouldn't know the mileage. All right.

Mr. Mullender: No further questions.

The Court: And questions?

Mr. Wheeler: Yes, your Honor.

#### Cross Examination

Q. (By Mr. Wheeler): Airman Phelps, you have testified that you picked [139] up a hitchhiker on the outskirts of San Bernardino on Route 66, and that this man was wearing a military uniform,

(Testimony of Eugene A. Phelps.)  
and you stated that you placed him behind the wheel; is that correct?      A. Yes, sir.

Q. What did you do then?

A. I went to sleep, sir.

Q. Prior to your going to sleep, did you state anything to this man to whom you had entrusted a Government vehicle?

A. Yes, sir, I told him that the engine was bad, that it wasn't holding any oil pressure, and not to drive it too fast, and to be sure that he woke me up in Victorville.

Q. And when was the next time you were awake?

A. When he woke me up in Barstow, sir.

Mr. Wheeler: No further questions.

The Court: All right. Any questions?

Mr. Calabro: Yes, your Honor.

#### Cross Examination

Q. (By Mr. Calabro): Mr. Phelps, would you please tell us what your duties were at the time that you were dispatched for this trip, as being in charge of the staff car section?

A. Well, there is about five men, and I had to make [140] sure that they kept the cars clean, and that they took the runs when they was issued out, and just took care of the section, plus driving myself.

Q. Were you the only driver in this staff car section?

(Testimony of Eugene A. Phelps.)

A. No, sir, I wasn't. There was approximately five or more, or maybe less at that time.

Q. Other drivers besides yourself?

A. Yes, sir.

Q. And were these other drivers under your command?

A. You can say in a way that they were. In a way they were just—

Q. You took your orders, did you, from Sgt. Snyder, who testified? A. Yes, sir.

Q. He was your superior? A. Yes, sir.

Q. Then so far as the line of command is concerned, the other drivers in the staff section were in your command, so to speak? A. Yes, sir.

Q. Did you have the authority to assign these persons to driving the automobiles also?

A. No, sir, not unless there was a request, like the one I had to take, and then I would just give them the trip tickets, and they would make their run. [141]

Q. At that time I understood you were an airman second class? A. Yes, sir.

Q. Calling your attention to the date on which you were assigned to this trip, do you recall whether or not you had worked that morning?

A. Yes, sir, I went to work at 7:30.

Q. How long did you work from 7:30?

A. I worked right up until the time to take the run, and I stayed right on working then.

Q. What did you do from 7:30 until 3:00 p.m., when you started this run?

(Testimony of Eugene A. Phelps.)

A. I drove around on the Base there. I had to take a couple of runs on the Base, and then I cleaned up the staff cars.

Q. Then is it fair to say, Mr. Phelps, that between 7:30 a.m. on February 4, 1954, until approximately 3:00 p.m. that same afternoon you worked continuously around the Base? A. Yes, sir.

Q. Either driving or cleaning cars, other than taking time off perhaps for lunch?

A. Yes, sir.

Q. And what time did you get up that morning?

A. 6:00 o'clock, sir.

Q. Do you recall what duties, if any, that you may have [142] had on the day before you were sent out on this trip, which would have been February 3rd?

A. Yes, sir. I worked until about 2:00 o'clock that night of the 3rd.

Q. Do you mean until 2:00 a.m., February 4th?

A. Yes, sir.

The Court: February 3rd that would be?

Mr. Calabro: Your Honor,—

The Court: Oh, yes, February 4th. Pardon me. That is my error.

Q. (By Mr. Calabro): So that, if I understand your testimony correctly, Mr. Phelps, you worked until—well, you worked on February 3rd all the way until 2:00 a.m. of February 4th?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And were you working as a chauffeur or

(Testimony of Eugene A. Phelps.)

driving someone during that period of time in the evening?

A. Yes, sir. If I remember right, I took two captains to L.A. International.

Q. And you got back to the Base at 2:00 a.m.?

A. Yes, sir, that is, approximately 2:00 a.m.

The Court: Speak a little louder, please.

The Witness: It was approximately 2:00 a.m. I am not [143] positive of the time.

The Court: The night before?

The Witness: Yes, sir.

Q. (By Mr. Calabro): So that you went to bed at approximately 2:00 a.m. on February 4, 1954, and you got up at about 6:00 a.m. on February 4th, and you had about four hours sleep?

A. Yes, sir.

Q. So that from 6:00 a.m. you worked—after you started working at 7:30, you worked until 3:00 p.m., or at least you were working until the time that this accident happened, or until the time you went to sleep; is that right? A. Yes, sir.

Q. And you went to sleep some time around midnight? A. Yes, sir, somewhere around there.

Q. Had you worked the full day from 7:30 a.m. on February 3rd up until 2:00 a.m. the following day? A. Yes, sir.

The Court: Your shift is a broken shift, is it not?

The Witness: No, sir. We work straight days, and if we have enough people, enough drivers, why, then you only have to work eight hours, but if you don't, you have to work overtime.

(Testimony of Eugene A. Phelps.)

The Court: At the time you were given this assignment, you were not sleepy, and you did not tell the sergeant that you had just gotten in at 2:00 o'clock the night before, and [144] you were tired and sleepy, and to pass it on to someone else, did you?

The Witness: No, sir, I didn't.

The Court: Were you sleepy? You did not feel sleepy, did you?

The Witness: No, sir, I didn't.

The Court: You did not complain to the officer that was with you that you were sleepy, or anything like that?

The Witness: No, sir.

Q. (By Mr. Calabro): When you returned from your trip to L.A. International Airport at 2:00 a.m. on February 4th, did you turn in a trip ticket to Airman Partch?

A. No, sir. He is the day dispatcher, and they had a night dispatcher at the time, and I turned the trip ticket into him at that time.

Q. There was a trip ticket turned in to the dispatcher then on duty? A. Yes, sir.

Q. And do those trip tickets remain a part of the records of the dispatcher?

A. I believe for 90 days is all, sir.

Q. And do those trip tickets come to the attention of Officer Snyder—or, I am sorry, Airman Snyder?

A. Not especially, unless there was something on there, that there was something wrong with the vehicle, or something like that. [145]

(Testimony of Eugene A. Phelps.)

Q. Were there any other drivers available for the trip to the Biltmore Hotel with Lt. Col. Joyal at the time you were sent out?

A. No, sir, I was the only driver around at that time.

Q. All the other drivers were out at the time?

A. Yes, sir.

Q. Were most of the other drivers in your staff car section working about the same length of time you were,—I mean in hours per day?

A. Yes, sir.

Q. The staff then was underhanded at the time?

A. Yes, sir.

Q. Or undermanned, I should say?

A. Yes, sir.

Q. Did you wake up at all between the time that the hitchhiker started to drive until the time that he awoke you personally after you arrived at Barstow? A. No, sir, I didn't.

Q. Did you ever give him permission to drive the car from Victorville to Barstow? A. No, sir.

Q. Was the trip from Victorville to Barstow made against your will?

A. Well, there wasn't much will when I was sleeping.

Q. Then if there were any stops—I am sorry. Strike [146] that.

Were you aware of any stops having been made between the time that you fell asleep after leaving San Bernardino until the time that you were awak-

(Testimony of Eugene A. Phelps.)

ened by the person whom you authorized to drive the car?      A. No, sir.

Q. Do you know whether or not he had any trouble with the car between San Bernardino and Barstow?      A. No, sir, I don't.

Q. At the time that the accident happened, then, you were on your way back to the Air Force Base, were you not?      A. Yes, sir.

The Court: You say you have taken many of these trips. You said you took a couple the day before. In these trips if you ever got sleepy, there was nothing in the rules that prevented you from stopping the car at a gas station, and taking a cat-nap, and sleeping, was there?

The Witness: No, sir, there wasn't.

The Court: There isn't any such?

The Witness: No, sir.

The Court: And if you had arrived late on that account all you would have to do is to explain to the man that you had gotten sleepy, and that you pulled off on the side of the road until you woke up, or you went into a station and did that; isn't that true? [147]

The Witness: Yes, sir.

The Court: On the contrary, it is against all rules for anybody who drives a Government car, whether it is a recon. car, or any kind of a car, to entrust the vehicle to anyone else; isn't that true?

The Witness: Yes, sir.

The Court: Anything further?

(Testimony of Eugene A. Phelps.)

Mr. Calabro: Yes, your Honor. I am just giving your question some thought.

Q. Do you recall the happening of the accident?

A. No, sir.

Q. Did you ever see the truck involved in the collision before the accident happened?

A. No, sir.

Q. When was the first time that you were aware of the fact that an accident had occurred?

A. About 24 hours later.

The Court: The only thing that you remember about this soldier is his turning the car over to you, and you starting back?

The Witness: Yes, sir.

The Court: And then you have no recollection?

The Witness: No, sir, I don't.

The Court: That is a common experience. I have tried these cases by the hundreds in the last 28 years, and it is [148] a common occurrence for a witness, especially one which had a head injury, a serious injury, to remember nothing beyond a certain point.

Q. (By Mr. Calabro): Did you have some sort of an argument with the driver of the car when you woke up in Barstow?

A. I just told him I thought it was pretty nice of him to take me out of my way like that, and getting me into trouble. That is all I said to him, and started back then.

Mr. Calabro: No further questions.

The Court: Anything further?

(Testimony of Eugene A. Phelps.)

Mr. Wheeler: Just one short question.

The Court: All right.

Cross Examination—(Continued)

Q. (By Mr. Wheeler): How long were you hospitalized after this accident?

A. I was in the hospital 20 days, and then I was on the quarters for about two months.

The Court: Where were you injured, do you know?

The Witness: I had a fractured skull, and a broken foot, and some lacerations.

Q. (By Mr. Wheeler): Is that the scar on your forehead from the fractured skull, that you have up over your left eyebrow that runs up through your hairline? A. Yes, sir. [149]

Q. How long was that skull fracture?

A. They told me it was fractured to the eye socket, sir.

Mr. Wheeler: That is all.

The Court: All right.

Mr. Mullender: No further questions from this witness, your Honor.

The Court: All right, step down.

(Witness excused.)

Mr. Mullender: Your Honor, I have just one more witness.

The Court: All right. Let's finish with the witnesses, and then we will take a recess until morning.

Mr. Mullender: This will be very short, your Honor.

The Court: Unless there is rebuttal. I want to hear the testimony tonight, and then you can come back tomorrow and argue the case. It is late, and there is no use of crowding it all in in one day. We can finish tomorrow and discuss the issues then.

### THOMAS H. HARDING

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Thomas H. Harding, H-a-r-d-i-n-g.

The Court: Speak a little louder, will you, so that [150] everybody can hear you.

### Direct Examination

Q. (By Mr. Mullender): Mr. Harding, what is your business or occupation?

A. Mechanic, automobile mechanic, Dahlgren Texaco Service.

Q. That is your present occupation; is that correct? A. Yes, sir.

Q. Approximately a year ago, what was your occupation?

A. Heavy equipment operator for the United States Air Force.

Q. And where were you stationed?

A. At George Air Force Base.

Q. Do you recall where you were on the night of February 4, 1954?

A. Silver Saddle Cafe, San Bernardino.

Q. Were you on duty?

(Testimony of Thomas H. Harding.)

A. No, sir, off duty.

Q. Were you in uniform? A. No, sir.

Q. And between what hours were you in the Silver Saddle Cafe?

A. I am not sure, but it was around 9:00—well, from 9:00 till 1:00, I guess, approximately.

Q. Between 9:00 and 1:00. Do you know whether or not [151] there was an accident involving an Air Force car the next morning?

A. Yes, sir.

Q. How do you know that?

A. The car was gone the next morning when I went to work, and when they got the report in I was there, that it had been involved in an accident.

Mr. Calabro: Just a moment. I am going to object.

The Court: I don't get this at all.

Mr. Calabro: Well, the question was whether or not he knows if there was an accident, and how does he know that, and he says that he knows it because the following day he reported to work and somebody told him, or a report came in that there was an accident. That is based purely on hearsay, and I move the answer be stricken.

The Court: Just a minute. What is the object of this?

Mr. Mullender: The object of asking whether he knew there was an accident was to tie down the date, the fact that he has said what date he was in the bar, and what happened that night.

(Testimony of Thomas H. Harding.)

Mr. Calabro: I don't see what happened in the bar has anything to do with it.

The Court: As to the hour when they left. All right.

Mr. Mullender: We will show that.

The Court: Of course, if it is merely to fix a time, [152] it is all right. Otherwise there is no denial that the Government car was involved, is there?

Mr. Mullender: No, only to fix the time, your Honor.

The Court: I think you have admitted that.

Mr. Calabro: Yes, they have, in their pleadings.

The Court: I think because of that I will admit it. Go ahead. You didn't find the car when you went to work?

The Witness: No, sir.

The Court: All right. Now let's get to it. Where do you go from there?

Q. (By Mr. Mullender): Were you sent out to pick up the car?

A. No, sir, I don't think I was. The staff sergeant that worked in the office at the time was the one that was sent out.

Q. Do you know the defendant Phelps?

A. Yes, sir.

Q. Had you known him at that time?

A. Yes, sir.

Q. And did you see him at the Silver Saddle?

A. Yes, sir.

Q. Do you know about when you saw him?

(Testimony of Thomas H. Harding.)

A. It was approximately 11:00 or 11:30. That could vary on hours, though, either way.

Q. Do you know how long he had been there?

A. No, sir, I don't.

Mr. Calabro: What was the answer?

The Court: Do you know how long he had been there?

The Witness: No, sir, I don't.

Q. (By Mr. Mullender): Did you have any conversation with the defendant at the bar?

A. Yes, sir, I did.

Mr. Calabro: I am going to object, your Honor, to any conversation he may have had with the defendant Phelps on the ground it is pure hearsay against us plaintiffs, as far as we are concerned, and it constitutes pure hearsay as far as we are concerned. I don't see how it is material to the question of negligence or scope of employment, so I am going to object on the ground it is immaterial.

The Court: If it relates to his intentions as to where he was going, I think it is material. If it is as to others, it is not. But in determining the scope of employment the inquiry is legitimate.

Mr. Calabro: Then the proper question, your Honor, would be whether or not the defendant Phelps made any statement to the effect that he was going to Barstow.

The Court: He can't ask him. If he did that, you would object on the ground it is a leading question.

Mr. Calabro: I will stipulate that he may ask him that question, your Honor. [154]

The Court: Now, you were getting along very

(Testimony of Thomas H. Harding.)

nicely. Don't have me at the end of a nice day criticize you gentlemen on what you are doing. We are getting along very nicely, so let's go on. It is a nice friendly lawsuit, and let's keep it that way.

Q. (By Mr. Mullender): Will you tell me what that conversation was?

Mr. Calabro: I am sorry, your Honor,—just a moment, please, Mr. Witness. I think in view of the court's statement that perhaps the witness might properly be instructed to tell us of conversations relating to any intentions.

The Court: I am not interested in anything else. If he made any statement as to where he was going, or which way he was going, that is all we are interested in. Anything else we are not concerned with.

The Witness: Only back to the Base.

The Court: What was that?

The Witness: The only place he said he was going was back to the Base.

The Court: Now, wait a minute. You saw him first at 11:30, did you say?

The Witness: It was around 11:30.

The Court: All right. When did you leave?

The Witness: Approximately 1:00 o'clock.

The Court: Was he still there? [155]

The Witness: No, sir, he had gone.

The Court: He had gone. Can you fix the time when he left?

The Witness: No, sir, I can't.

(Testimony of Thomas H. Harding.)

The Court: You can't. What else did you have?

Q. (By Mr. Mullender): Did you observe the demeanor of the defendant in the bar?

A. What do you mean by that?

Q. Did he appear to be drunk?

Mr. Calabro: I object to that.

The Court: I am going to sustain the objection. I don't think that is material because, under the law of California, if a servant gets drunk on his job, that is the lookout of the employer, and that is not a defense.

Furthermore, you have shown nothing yet to contradict the implication of the *prima facie* case that shows clearly that he operated the automobile negligently, whether he was sober or not. So I don't think it is material, and, frankly, I don't want to create a record here for a court of inquiry. I am not interested in that. Let them do their own work. They pass the buck to us many a time. They did in the Shibley case. So I will pass the buck back to them, and I am not going to create a record for them, and I don't think it is material because it is not a defense.

The point you have emphasized is scope of control, [156] that it was outside of the scope of control, and that I have allowed. The other one is not material.

Mr. Mullender: Your Honor, it has always been my understanding that if the employee goes off for some purpose of his own, then he goes outside the scope.

(Testimony of Thomas H. Harding.)

The Court: That is true, but drinking is not a purpose of his own. It may be incidental. Drinking is not a part. That is not considered.

Mr. Mullender: Your Honor, do you think if a man gets drunk, good and drunk, that he is not——

The Court: I am not deciding abstract questions. The rule is that if he goes out of time and out of place. That is the law of California, and nothing governs but the law of California. The law of California is clear, and the Restatement is clear, and that is that if he goes out of time and out of place, then the question arises, and I am going to decide that at the proper time. But I don't think it is material whether he was drunk or not. I don't think it is a defense under the law of California. Suppose you have a chauffeur, and he gets drunk. You don't mean to say that that releases you from liability. You are not supposed to have a chauffeur that gets drunk, and the Government is in the same position.

Mr. Mullender: I have no other questions then, your Honor.

Mr. Calabro: No questions. [157]

Mr. Wheeler: No questions, your Honor.

The Court: All right. Step down. [158]

\* \* \* \* \*

The Court: Gentlemen, I have had the benefit of counsel's research, and I have gone through a lot of research myself, so I am ready to decide this case. [199]

We may as well start with this proposition, which is the last one counsel adverted to, and that is, that

we can excuse this soldier because, while he was asleep, somebody drove the car.

We go back to the familiar proposition that drunkenness is a voluntary act, and it does not excuse anything that happened. The only materiality it has in a case involving a criminal offense is that the man may be so drunk that he may not be capable of forming a specific intent, and those offenses require specific intent.

You may apply the same thing to sleepiness. A man cannot shift responsibility by merely saying, "I turned this automobile over to a soldier to drive, and I was asleep while he drove." The answer is that the act of the soldier he picked up was his act, because he voluntarily, not in a case of extremity, not in a case of what we call in Roman law force majeure, but he voluntarily picked up the soldier and then let him drive.

He doesn't tell us whether he let him drive immediately after he got in or whether he turned over the car after they had been on the road a part of the way.

So we eliminate any question of coercion, or any question of shirking of responsibility, and we hold the defendant Eugene Phelps liable for whatever happened from the time he turned over the car to the other soldier, because that [200] was a voluntary act. Furthermore, it was an act which he knew was in violation of every rule, and, therefore, the voluntariness must be assumed in view of the knowledge that it was a violation of all rules, which prohibited any military equipment to be driven by

unauthorized personnel, and which prohibits any military personnel from turning over the driving of a car or to entrust it to somebody else who is not in the same field, who does not have the same authority, and who is not along on the same trip.

We eliminate right from the start the fact that this soldier picked up another soldier who, while he was asleep, drove him to a place to which he did not want to go.

If he had stood by the side of the road, and somebody had picked him up, we might consider that, but even then we might say, "What business did he have standing by the side of the road and leaving the keys in, so that a stranger could pick him up and drive him?" But we don't have that situation. So the G.I. whom he picked up and who drove him to Barstow was his agent, and if he drove him to a place other than a place he wanted to go to, he must bear the responsibility, because he made it possible. Not the Government, but he himself, by violating positive instructions, made it possible for the man to do that, and so he is held responsible.

That brings us to the proposition that the Federal Tort Claims Act does not establish absolute liability. [201]

The section reads, and let me get that. It is now a part of the Judicial Code, and I think it is Section 921. Let's look at it again. I don't seem to find it quickly, but I have the quotation in front of me. The section says that the Government is liable for acts caused by the negligence or wrongful act of

an employee while acting within the scope of his office or employment.

While I am personally of the view that the scope of employment must be determined by local law, ultimately, because it is a mixed question of law and fact, it becomes unimportant because, as I said during the discussion, in determining whether a thing is or is not in the course of employment we must determine the nature of the relationship between the soldier and the Government.

In the case of Williams vs. United States, to which counsel for the Government referred, the court refers to a case which arose in my court, United States vs. Standard Oil Company of California, 332 U.S. 301, in which the court held that the relationship between the Government and the soldier is a peculiar type of relationship, and the court declined to approve a judgment I rendered in favor of the Government to recover for injuries caused to a soldier by a truck driven by an employee of the Standard Oil Company.

I held that whether strictly speaking there was a relationship of employer and employee, or any other relationship, [202] it is a relationship which should be recognized in law, and a man who injures that relationship should, in the present view of the law, be held responsible. The strange part of it is that England, where the doctrine of relationships arose, and from whom we borrowed it, did not have any difficulty in holding a third person liable in a suit of the Crown, and that is the case I followed, but the Supreme Court declined to follow the Eng-

lish cases and held that it was a matter that Congress had evidently overlooked, and that, therefore, the Government could not recover.

Incidentally, that case went all the way to the Supreme Court because there were \$3,000,000 worth of claims which the Government was asserting for injuries to soldiers, and that is why a case which involved only \$190 made its way all the way to the Supreme Court of the United States because of the importance of the issue.

Now, regardless of that, it seems to me that this problem can be solved very easily if we apply California law, which gives the plaintiffs the benefit of a more liberal approach than if we approach it strictly from the standpoint of the military law.

Counsel has correctly stated the conditions which must occur before we determine whether an act done by an employee is or is not in the course of employment. I will quote from his own case, the one which he cites, Loper vs. Morrison, because it is a leading case on the subject. That is in 23 C. 2d 600, and I quote from Page 606:

“\* \* \* under these authorities the factors to be considered, in so far as pertinent to this case, are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties.”

Then the court made this remark, and that is why I say when you are reading language of the

Supreme Court before a jury, it is one thing. When you are arguing to me as a jury what to find, it is an entirely different thing. This is what the court said:

"Under the circumstances of this case we cannot hold as a matter of law that Morrison's trip to the tavern and to Dolan's home constituted an abandonment of his employer's business. As said heretofore, it was within Morrison's authority to collect accounts at the time the accident occurred. The employer's liability was not necessarily terminated by reason of the fact that Morrison combined a private purpose of his own with the business of his employer."

Now, remember, he was using his own automobile. [204] He was not driving a company truck. He was using his own automobile to collect accounts after hours. Therefore, he had a right to determine when he was going to do it, and which way he was going to go, and the jury having decided in his favor—this was a verdict, with judgment for the plaintiff—the jury having decided in his favor, the majority held that they could not disturb it because they could not say as a matter of law that he was outside of the course of his employment.

There was a very strong dissent by Judge Trainor, joined in by Judge Edmonds, and he argued that the facts were undisputed, and it was his view that it was a question of law.

At any rate, the elements I have enumerated, including the freedom allowed to the employee while he is exercising the powers of employment, is of

great importance, and it brings in once more the question of military discipline, and that a person subject to military discipline does not have the freedom that an employee, even a chauffeur, has in these circumstances.

That is why in one of the late decisions on the subject the Court of Appeals has said that if you tried to fit cases into a particular groove, you can find cases both ways through the reports, but the difficulty is that each case must be determined according to its own facts, and that when [205] you do that, then the apparent inconsistency disappears.

One of the cases I refer to is *Tyson vs. Romey*, 88 C.A. 2d 752. In that case a jury had found that the act was in the scope of employment, and awarded \$18,500, and this is what the court said, and it is very significant, in that they cite a lot of cases that have been cited here on one side or the other, including *Gordoy vs. Flaherty*. They say this:

“Numerous citations may be supplied seemingly upholding inconsistent views on the scope of employment as applied to the ‘going and coming’ rule on facts based upon actual or implied findings. Among appellants’ citations are found: *Nussbaum vs. Traung Label & L. Co.*, 46 C.A. 561; *Bayless vs. Mull*, 50 C.A. 2d 66; *Postal Tel.-Cable Co. vs. Industrial Accident Commission*, 1 Cal. 2d 730; *Gordoy vs. Flaherty*, 9 Cal. 2d 716. Plaintiffs’ list is headed by *Richards vs. Metropolitan Life Insurance Co.*, 19 Cal. 2d 236; *Robinson vs. George*, 16 Cal. 2d 238, and *Curcic vs. Nelson Display Co.*, 19 C.A. 2d 46. It is not necessary to analyze the above or other

cases. The rule is that when there is a substantial departure by the agent from his principal's business, the principal is not liable, but the opposite conclusion should be reached if the act or conduct of the agent is fairly and reasonably an incidental event or circumstance [206] connected with the assigned work."

So that if it constitutes a substantial departure from the business, there is no liability. It is very significant that this refers to the Restatement of the Law on Agency, and I will read you the section to which it refers, and one or two others which are very significant here. They refer to Section 228 of the Restatement on Agency, and this is the italicized portion which sums up the rule:

"(1) Conduct of a servant is within the scope of employment if, but only if:

"(a) it is of the kind he is employed to perform, as stated in Section 229;

"(b) it occurs substantially within the authorized time and space limits, as stated in Sections 233-234;"—

Let's keep those words in mind, "authorized time and space limits."

"(c) it is actuated, at least in part, by a purpose to serve the master, as stated in Sections 235-236."

That was (1)(a), (b), and (c). Then:

"(2) It is a question of fact, depending upon the extent of departure, whether or not an act, if performed in its setting of time and place, is so different in kind from that authorized, or has so little

relation to the employment, that it is not within its scope.” [207]

We do not need to read Section 229, although it may help to refer to some of the conditions:

“(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.”

There, again, is where the military discipline comes in. It must be authorized. (Continuing):

“(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

“(a) whether or not the act is one commonly done by such servants;

“(b) the time, place and purpose of the act;

“(c) the previous relations between the master and the servant;

“(d) the extent to which the business of the master is apportioned between different servants;

“(e) whether the act is outside of the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;”—

I do not think that the other conditions need be read, because those given in (a), (b), and (c) are controlling, whether it is commonly done by the servant. [208]

Here we are confronted with a situation where he admits going out of the way, and especially entrusting another soldier with the control of the car,

which is not commonly done in the performance of that duty.

Then we come to the other section to which they refer, and there we come within the limitation, the relationship of time and space:

“233. Time of Service. Conduct of a servant is within the scope of employment only during a period which is not unreasonably disconnected from the authorized period.”

Then in the comment it says:

“The employment exists only during the time when the servant is performing the work which he is employed to do. It does not begin at the time when it is necessary for him to act in order to perform the required service. It begins only when the master may direct the method by which the servant is to perform the work, and terminates when the master may no longer control it. When it begins and terminates is determined by the terms of the employment and all the facts of the situation. The period during which the master may control the doing of acts, if any are done, is somewhat broader than the period in which the master has a right to direct that the servant do something.” [209]

Now, of course, we are confronted with the problem that the soldier is on 24-hour duty, and may be ordered to do certain things. But it is not contended, and it cannot be contended that it was necessary for him to be where he was, far away from his route, at 5:00 o'clock in the morning, when in the ordinary course of events he could have re-

turned, allowing ample time to eat, by midnight of the night before.

So that the element of time, assuming that he was to perform it within a reasonable time, and assuming that he did not deliberately take time off to sleep, as he had a right to do, that it wasn't one of those conditions, because he actually maintains that they never stopped on the road for that purpose, that they were on the go all the time, although it is difficult to account for what he did between 7:00 o'clock, when he had dinner at Pasadena, and if we allowed one hour for that, what he did between 8:00 o'clock and 5:00 o'clock in the morning, and why it took that length of time to traverse that distance. Even if we take his own word, that he left the bar at about 11:30, when that other soldier saw him last, it is very difficult to account for a period of over five hours, with a distance of only about 60 or 70 miles.

Now, another comment in Section 234, as to which it refers, says:

“Conduct is within the scope of employment only [210] in a locality not unreasonably distant from the authorized area.”

This is a reasonable rule, which these cases follow, and that is, if you tell a man to go a certain way, if he makes a reasonable departure from that area, and the accident occurs during that departure, they will be held liable. But if the departure is way out of line, even if he seeks to perform business of the employer which he might have performed if so directed, the court holds that the em-

ployer is not liable, and the annotators say in Illustration 2:

"P directs A, a traveling salesman supplied with a car, to sell goods only in Albany. The salesman drives to Schenectady to sell goods to a merchant there. While driving in Schenectady A is not within the scope of employment."

Here is a very good illustration, where even though he was doing the same thing in Schenectady that he was to do in Albany, where his direction was to transact business in Albany only, the liability does not attach. Then in the comment the annotators say this:

"The fact that the act is not done at the authorized place is always a fact to be considered in connection with the other elements (nature of the act, the time, and the purpose) which determine whether or not the act is within the scope of employment. Thus, [211] an act which is a slight departure from that authorized as to its nature, place, and time of performance may be found to be not within the scope of employment, while a similar act done at the required place and time, or an authorized act done at a slightly different place or time, would be within the scope of employment."

Then there is another comment which I will not read, which says that a departure is a matter of degree.

Now, as I said, you can find cases that suit almost every situation. Some of the cases cited by counsel for the plaintiffs are easily distinguishable. But I have two California cases, and they have been cited

repeatedly ever since, and are cited even in this last case in 23 Cal. 2d. The first one is the Kish case, and the courts have referred repeatedly to the Kish case, and to the other case, a later case which followed it, which to my mind are the closest to the case before us.

Kish vs. California State Automobile Association, 190 Cal. 246, was a case where an employee was employed to install road signs, and one evening after his job had been completed he took himself and some friends to supper in the city, and the question arose whether that was an incidental use, and the court said it was not. The court unanimously sustained a judgment of non-suit, granted by the Superior Court of Fresno County, with all the justices participating, [212] although for some reason which does not appear Mr. Justice Waste was disqualified. I think it was just right after he had come from the District Court of Appeals, and it may well have been that he had written the Court of Appeals decision in the case before it went to the Supreme Court. I don't know why. At any rate, it shows all of the justices concurring, Justices Lawlor, Shaw and Sloane, Justice Lennon writing the opinion, and Judge Waste, being disqualified, did not participate. This is what the court says:

"It may be conceded that the use of the truck for transportation to and from their work to their home was for the benefit of the employer indirectly for the reason that it permitted them to devote more time to accomplish the results of installing road signs, for which they were employed. Also,

from the fact that they had what may be termed a 'roving commission,' having no fixed hours of employment and no fixed place of employment, it may be admitted that their employment commenced when they left the house in the morning and did not terminate until they returned in the evening. This point was, however, the utmost boundary of their employment and was not enlarged by the fact that they were permitted the use of the truck in going to places to get their meals. This was permitted solely for the accommodation of the employees themselves. We cannot assent to the [213] reasoning of plaintiff that because it was necessary for employees to eat and sleep in order to perform the labor for which they are employed that these acts are incidental to their employment."

In other words, if during the period of employment they had to eat, they could use the car, but after the day's work was over the boundary was exceeded. So that we have a case here where the court said if that same thing had been done during the daytime, while he was still on the job, they would have been liable, but because it was done after the job was terminated, the boundary had been breached.

Now, the case which I think is closest to the present case is *Gordoy vs. Flaherty*, which, by the way, is cited by Judge Mathes, and also cited by the Court of Appeals in the *Williams* case.

In that case, which is reported at 9 Cal. 2d 716, there was a verdict for the plaintiff. Bear in mind that the Court of Appeals and the Supreme Court

of California had held that the question was a question of fact, generally, but in that particular case they felt there was such a departure that they could decide it as a question of law, and the judgment of the Superior Court was reversed. It is a very brief opinion. It is a per curiam opinion, which means that it is a composite piece of work. Having sat on the Court of Appeals, I know what per curiams are. I just signed one yesterday, a per [214] curiam on a rehearing, because each of the three of us had ideas, and one judge formulated them into one form, and we all signed it.

Now, Flaherty was employed by the Union Oil Company as a service station attendant. I will read the portion of the opinion that gives his duties:

“\* \* \* As part of his duties Flaherty was occasionally required to go into town to get change, and also to turn in money to the branch office of the company. There was no route prescribed for these errands. Just before noon on the day of the accident, Flaherty took his own automobile, drove to the bank to get change, intending thereafter to proceed to the branch office of the company to leave his money.”

Now, mark you, this is what we call a return trip case. His original trip or his straight trip was all right. He had gone to the bank to get change, which was all right. Now, let's see what he did on the return trip: (Continuing)

“While he was stopping at the bank, Mrs. Frantz, mother of a friend and fellow employee, asked him to take her to her home in Santa Clara, a few miles

away from San Jose. He agreed, and after assisting her into the car with her parcels, he proceeded to drive on toward the company office. But instead of stopping there, he kept on driving in the direction of her home. The collision [215] took place three blocks past the office."

In other words, on his return trip he did pass the office, so to that extent he was on the same route, but he had passed it by three blocks when the accident occurred on the same street. This is what the court said:

"It seems perfectly clear that at the time of the accident Flaherty had departed from his employment and was performing services for another, outside its scope. This is not a case of a choice of different possible routes, or minor or immaterial deviations in the course of a business errand. If Flaherty had taken Mrs. Frantz as a passenger, and driven her to some point between the bank and the branch office, or had even deviated by a short distance from the most direct route, it might still be held that he was within the general scope of his employment at the time of the accident \* \* \*. But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort."

And they cite the Kish case, *Kish vs. California*

State Automobile Association, and also a New York case, and [216] a New Hampshire case. Then they tried to show that it was a customary courtesy extended to an employee, but they said there is no evidence that the company had any knowledge, and so forth.

Now, while it is very difficult in these cases to find any case that is identical as to facts, it seems to me that that case is about as favorable to the plaintiffs' contentions as there could be, because there the man had not actually reached the neighboring town. He was still on the same street where the office was. He had passed it, but he intended to go to this town a few miles away. Nevertheless, the court held that it was a separate, distinct enterprise from that upon which he was engaged. That conforms to the statements in the Restatement, and to the illustrations as given in the Restatement.

Now, if we apply the principles of these cases to the facts here, we are confronted with the proposition that this soldier was told to take an officer to the International Airport, that the International Airport is in the outskirts of Los Angeles, and that instead of that, the officer preferred that he be dropped in Los Angeles, so that the ultimate destination of the trip was as was intended, and the officer had the right to tell him to drop him there. As I said during the course of the argument, it may well be that he did not have a definite plane reservation, and probably [217] thought it might be difficult to get one at that time of the day, so decided to stay overnight. The hotel register shows that he

left at a very early hour, and we all know that these various airplane companies maintain bus service from the Biltmore, so that he probably decided his chances of getting on a plane without a definite reservation were better at that time, or he may have gotten a reservation after he got to his room, and left in the morning.

At any rate, we are not concerned with that, because the mere fact that he was destined for the International Airport and instead came to Los Angeles does not have any particular significance.

What we are concerned with is the time element and the place element. The record shows that he got here at 6:05 p.m. That is the time that the officer registered, and the soldier did not stay at a hotel. The soldier started on his way back, and he himself tells us that he started back, that he went to Pasadena and there stopped to have dinner, and from there he went on to San Bernardino. There the trail becomes confused, because all we know is that he stopped at the bar and had a couple of beers, as he calls them. That is a soldier's expression for drinking, no matter what they drink. I am inclined to think, as a matter of fact, that you could almost take judicial notice of the fact that a soldier very seldom drinks beer. At any rate, he had a couple of beers. And, as I said, I do not want to make a record for a board of inquiry, because he suffered very serious injury in the accident, and I did not allow any further inquiry into that. At any rate, he was seen there at 11:30. Then we find him in this accident. Of course, he suffered a head

injury, and he does not remember what took place before.

All he remembers is that he picked up a soldier, asked him to drive, told him where he was going, and said to be sure to wake him up. Now, of course, the turning over of a vehicle to another person was a violation of the military regulations. I do not need to decide whether in so doing the Government would be liable if the accident had occurred while the other soldier was driving. We do not need to decide that here because that was not the case.

The soldier evidently drove him safely to Barstow, which is way off from his destination, and he must have known that the soldier was going to Barstow, although he says now he does not remember, because otherwise the only other inference that could be drawn would be that the soldier told him he was going to the same camp. He was not going to the same camp because he did not have on the same uniform. There are no Marines on that Base, and there is no infantry on that Base. He said it was either a Marine or an infantry soldier, and that he was not an airman. So he must have known he was not going to the same place, even though he does not remember. [219]

I don't think the soldier is being untruthful, and I take judicial notice of the fact that when an injury of this character takes place it is very difficult to remember what had taken place before. I am merely pointing to the fact that the probabilities are that he knew where the soldier was going, because there was no such personnel at the camp to

which he was going. Evidently, he thought, "Oh, well, we will take you there, and then go back, and nobody will know the difference. It is late at night."

If he had said that he had told him to wake him up when he got to the cross-roads, where the roads fork, one going to Barstow and the other to the camp, the story would be plausible. But the story he tells is not a plausible story.

Why should a soldier who does not belong to that camp want to be taken to the camp. They would not even let him in. The sentry would not allow him to go in. They would ask him what he was doing there.

So the presumption must be that he knew that this man was going to Barstow, and he probably said, "That's all right. Let's go to Barstow, and then you get off there, and you wake me up, and I will drive the other distance. It is only 25 miles away, and it is late at night, and it will be all right."

I am making this assumption because I am the trier [220] of the facts, and I am to judge the credibility of the witnesses, and that portion of the story simply did not ring true to me, because it is preposterous. Even taking the defendant Phelps' version of the situation, I know enough about soldiers to know that if the fellow had said to him, "Look, it isn't a case of going to another town," or to say to a fellow, "You come and bunk with me," well, you do not do that in the Army.

So the other soldier had no business whatsoever to transact at the Air Force Base, where he was

going, and the only assumption that can be made is that Phelps knew all the time they were going to Barstow, that he agreed to the deviation, thinking that everything would be all right, that he would get over his sleepiness, caused by the lack of sleep the night before, or by the two beers he drank, and that by the time he got to Barstow he could drive on, and that nobody would kick because he could say, "Oh; well, I got sleepy, and had to sleep before I came back," and nobody would discipline him for that because the hour of his return was not put down in writing. He was expected to return at a reasonable time.

So the only inference to be drawn from the fact is that Phelps knew that they were departing from the regular road, and that they were taking additional time to do it, that he was doing what he thought was a good act to a fellow soldier who needed transportation, and he thought he could get [221] by with it, that everything went along all right until they got to Barstow, and the accident occurred when he started on his way back.

Then let's put it the other way. Let's assume that the story Phelps told is true, and I am using the word "story" not in an opprobrious sense, but in the way a newspaper man uses it,—any narrative, not a fictitious story, and that the version—let's call it the version—that he gave at the interview with this soldier is true. Let us assume that is true. It does not help the situation, because he cannot avoid the voluntary character of his own act in departing from the route and going upon a side trip, because

he entrusted the car to the other soldier, he went to sleep, and if the other soldier broke his agreement with him, he is charged with what the other soldier did.

Therefore, the departure, even though it occurred during the time when he was asleep, was his departure, and the accident did not occur in the scope of his employment. So whether you take his story at its face value, or whether you discount it, as I am inclined to do, because it does not sound reasonable that a soldier who is stationed in Barstow, or somewhere else, would want to land in an airfield where he had no business being, the fact remains that he deliberately chose to depart from the task that he was about, and the task was to return as quickly as possible to his Base by the ordinary [222] route after he had dropped off his passenger. He did not do that. He went upon a side trip of his own, and that was just as much a departure as the departure of the employee of the Union Oil Company, who started to take the mother of a fellow employee to a neighboring town, and had an accident on the same street on which the employer's business was located, and only three blocks away.

So the judgment will be for the Government, that the plaintiffs take nothing against the United States of America by reason of the complaint, on the ground that the accident was not caused by an employee of the Government while acting within the scope of his office or employment.

On the contrary, it was caused while an employee of the Government in charge of military equipment

deliberately departed on a venture of his own in order to accommodate another soldier, and that in both time and place it was a complete departure, which exonerates the Government from liability.

\* \* \* \* [223]

[Endorsed]: Filed July 28, 1955.

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[Endorsed]: No. 14926. United States Court of Appeals for the Ninth Circuit. Pacific Freight Lines and Sidney S. Russell, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 28, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14926

PACIFIC FREIGHT LINES and SIDNEY S.  
RUSSELL, Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

## STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. The court erred in failing to conclude as a matter of law that Eugene A. Phelps was acting within the scope of his office or employment.
2. The court erred in finding that defendant Eugene A. Phelps was ordered to return immediately to George Air Force Base after the officer had been delivered to said airport.
3. The court erred in finding that defendant Eugene A. Phelps was not acting within the scope of his office or employment at the time of the collision.
4. The court erred in its failure to find on a material issue, to wit: whether the hitchhiker was acting within the scope of his office or employment in driving the vehicle of defendant United States of America to Barstow, California.
5. The court erred in its failure to find on a

material issue, to wit: whether the accident of the hitchhiker in driving the vehicle of the defendant United States of America to Barstow, California is chargeable to the defendant United States of America.

6. The court erred in its Conclusion of Law III that defendant United States of America is entitled to a judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

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ANTHONY J. CALABRO,  
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Attorneys for Plaintiffs-Appellants

[Endorsed]: Filed November 4, 1955. Paul P.  
O'Brien, Clerk.